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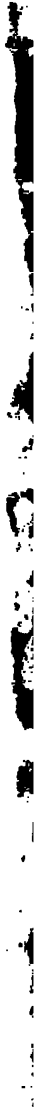


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R E P O R T S
OF
C A S E S

ARGUED AND DETERMINED
IN THE
Courts of Common Pleas

AND
Exchequer Chamber:

FROM
EASTER TERM 28th GEORGE III. 1788,
TO
HILARY TERM 36th GEORGE III. 1796.

By HENRY BLACKSTONE,
OF THE MIDDLE TEMPLE.

IN TWO VOLUMES
VOL. I.

THE THIRD EDITION, CORRECTED;
WITH ADDITIONAL NOTES AND IMPROVED INDEXES.

L O N D O N:
PRINTED BY A. STRAHAN,
Law-Printer to the KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, FLEET-STREET.
1801.



ADVERTISEMENT.

IT is with the highest gratitude and respect to that Court, whose proceedings are contained in the following pages, that the Reporter thus publicly acknowledges the very great encouragement and assistance with which he has been honoured.

MIDDLE TEMPLE,
July 31st, 1788.

* * * *The Reader is requested to observe, that by some error of the press in the first edition of this work, the order in which the Judges delivered their respective opinions in the case of Gibson & Johnson v. Minet & Fector, (vol. 1. p. 569.) was transposed. It should have been stated, that MR. BARON THOMPSON began, and that THE LORD CHIEF BARON EYRE concluded; but as the mistake could not now be rectified without introducing confusion in the references and pages, it was thought proper thus only to give notice of it.*

HILARY TERM,
1801.

J U D G E S
OF THE COURT OF COMMON PLEAS

During the period comprised in this VOLUME.

**Right Honourable ALEXANDER Lord LOUGH-
BOROUGH, Lord Chief Justice.**

Honourable Sir HENRY GOULD Knt.

Honourable JOHN HEATH Esq.

Honourable Sir JOHN WILSON Knt.

C A S E S

ARGUED AND DETERMINED

1788

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Twenty-eighth Year of the Reign of George III.

DALLY *against* KING (a).

THIS was a writ of right brought to recover a dwelling-house and lands at *Thorpe* in *Surrey*, tried at *Croydon*, before Mr. Justice *Gould*, at the Summer Assizes 1787. The count stated that "*Maurice Bailey* was seised in fee of the premises in question, and in the year 1729 devised them to his wife "*Jane* for life, remainder to his son *John Bailey* for life, remainder to his two grandsons *Maurice Bailey* and *John Bailey* in fee, who upon the death of the testator were seised of a remainder in fee in common. *Jane* entered, and was seised by taking the esplees, on whose death *John the son* also entered, and was seised by taking the esplees, in whose life-time "*Maurice* the grandson died without heir of his body, by which his brother *John Bailey the grandson* became seised of the whole remainder in fee, who died so seised, and on his death the said remainder descended to the Demandant as his cousin and heir, in the life-time of *John Bailey the son*, who afterwards died, and so the Demandant was entitled."—*Plea*, protesting that the remainder in fee did not descend to the Demandant, on the death of *John Bailey the grandson*, alleged that *John Bailey the grandson* devised the said remainder to his mother *Rachael Bailey*, who, on the death of *John Bailey the*

A writ of right cannot be maintained without shewing an actual seisin by taking the esplees, either in the Demandant himself, or the ancestor from whom he claims. *Qu.* Whether in a devise, the words "estate of what kind soever" immediately preceded and followed by particular descriptions of personal property, will pass a remainder in fee of lands vested in the testator?

(a) [See *Doe d. Burkitt & al. v. Chapman*, post. pa. 223 of this volume; and *Smith & al. v. Ciffin & Ux.* vol. ii. p. 444; in which cases the words "estate of what kind soever," and "testamentary estate," in a residuary devise, were held sufficient to carry the fee of

lands, though connected with words applicable to personal estate. As to the effect of the word *estate* or *estates*, see also *Hildsatt d. Cowper v. Marten*, Term Rep. B. R. vol. 1. p. 411. and *Fletcher v. Smiton*, Term Rep. B. R. vol. 2. p. 656.]

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"son,

1788. "son, was seized by taking the esplees, &c." and from her deduced a title to the tenant.

DAILY
AGAINST
KING.

Replication, traversed the devise of *John Bailey the grandson to Rachael his mother, &c.* Issue on the traverse.—Verdict for the demandant, subject to the opinion of the Court on the following case:

The will of *John Bailey the grandson*, made in the year 1756, was in the following words;

"I give to my mother *Rachael Bailey*, all that freehold messuage, tenement, or dwelling-house, orchard, garden, and all other the appurtenances thereto belonging, situate at *Thorpe*, now in the occupation of *A. B.* as also two acres of arable land lying in the common field, as also the stock of corn, grain, hay, goods, chattels, and effects or *estate of what kind soever*, also all other the utensils of husbandry, which shall be found, or be, in the dwelling-house or farm which I now rent of my father, situate in *Thorpe aforesaid*," (this was the estate in question in which he had the remainder in fee) "as also all that freehold messuage, tenement, or dwelling-house, orchard, garden, and all other the appurtenances thereto belonging, in *Thorpe aforesaid*, late in the occupation of *B. C.* to her sole use and behoof, and to her heirs and assigns forever."

On this case the question was, whether the words "*estate of what kind soever*," as they were inserted in the devise of divers particulars of personal property, "were sufficient to pass the remainder in fee vested in the testator?"

This was argued in *Michaelmas Term 1787*, when

Hill, Serjt. for the tenant, contended that the word *estate* passed all the interest which the testator had in the premises—That he meant to dispose of real property, because there are real estates expressly devised to his mother, both before and after this devise. Though the word *estate* be coupled with an enumeration of personal property, yet the sense of it cannot be restrained to such property, unless the whole will be so restrained, which it evidently cannot be, as there is a specific description of real property.

Bond, Serjt. for the demandant, argued that the words "*estate of what kind soever*," followed by the words "all other utensils of husbandry," and preceded by an enumeration of personal property, could never be intended to give any real property, much less a remainder, which the testator does not appear to have had in his contemplation. He cited *Cro. Car.* 447. 12 *Mod.*

594. *Preced. in Chanc.* 471. *Noy* 48. 1 *Eq. Caf. Abr.* 211. 1788.
Sir T Raym. 453. 14 *Vin. Abr.* 277. 2 *Att.* 102. *Cowp.* 238.,
 as relating to this point.

DAILY
 against
 KING.

The Court seeming inclined to adopt this argument urged by *Bond*,

Hill moved in arrest of judgment, on the ground that the demandant appeared to be a purchaser, and had not counted on an *actual seisin* of the person from whom he claimed.

In this term, *Bond* shewed cause against the rule,—arguing that it appeared on the record, that the demandant claimed on estate in fee-simple which was sufficient in a writ of right. His claim was founded on the seisin and will of *Maurice Bailey*, and the seisin of the several tenants for life under the will, by whose death the estate had devolved on him, as heir of *John Bailey* the grandson. He could not count in the ordinary form, alleging the taking of esplees, in *John Bailey* the grandson, who was only seised of a remainder, and had not actually taken the profits, neither could he claim under *John Bailey the son*, who was only seised for life. He has therefore stated his claim agreeably to the truth, and to the general form of the writ found in the register, viz. he has claimed the land “as his right and inheritance” generally, and has then shewn his title by a special count. This case of a general writ, and special count was frequent in the old law. *Bro. tit. General Brief*, pl. 13.—In *Co. Litt.* 52. b. it is said that an action of waste lies against a tenant for half a year, but in that case the writ must allege a term for years, being the only form in the register. The words “right and inheritance” mean only a fee-simple, which is enough to support a writ of right. *Fitz. Natur. Brev. p.* 1. It is equally a fee-simple, whether it be by descent or purchase, and being a fee-simple, it is an inheritance. It appears from *Litt. f.* 1. that a person claiming by purchase as well as descent, may allege the estate to be his inheritance. In one sense the demandant is a purchaser, being the appointee of the estate under the Statute of Wills (a), and coming in the place of the heir. He is “*heres factus*,” and stands in a situation unknown in the law at the time when it was first decided, that the demandant in a writ of right, must claim on his own seisin, or that of his ancestor or predecessor. The Statute of Wills having put the devisee in fee in the place of the heir by descent, but having given him no specific remedy to recover the

(a) 27 Hen. 8. c. 10.

1788. interest devised to him, the old remedy which was used in similar cases, must be shaped to the case of a devise, and the devisee must be allowed to found his claim on the *seisin* of his *devisor*, in the same manner as the heir by *descent*, does on the *seisin* of his *ancestor*. This action in the present case arises from the same necessity, and bears a strong resemblance to the writ *ex gravi querelâ*, which was brought where lands were devisable by custom, in which the devisee stated the *seisin* of the *devisor*, and the *devise to himself* as his claim to recover. *F. N. B.* 459. But when the right to devise lands, which was before good only by special custom, became general, no better form of action could be framed, than that which was used in similar cases.—The writ *ex gravi querelâ*, could not be brought in the present case, being founded on the special custom of some city or borough, and only triable before the mayor or bailiff of the place. *Termes de la Ley* 258.

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against
KING.

Where the law regulates the forms of actions, by prescribing certain previous requisites, it does not adhere so rigidly to the rule, as to deprive a party of his substantial right, through a mere defect of such formal requisites. The action of *quare impedit* is founded on a prior presentation of the party bringing it, his ancestor, or of those whose estate he has; but in cases of necessity, this requisite is dispensed with. *F. N. B.* 78. If this be allowed in *quare impedit*, a like necessity should prevail in the present case. Otherwise the clear right of a devisee in fee-simple would be defeated by an adverse possession.

But even if this objection were well founded, it is waived by the tenant having pleaded in bar. If the count be defective, it must be on account of a variation from the writ, either in *substance* or in *form*. Now it has been shewn not to have varied in *substance*, and if it be only in *form*, that ought to have been pleaded in abatement. But it does not vary even in form, since the count may particularize what was general in the writ. The tenant therefore ought not to be permitted after verdict to cavil at the form of the count which discloses an undoubted title to the lands demanded, and supports the allegation of the original writ.

Hill, for the tenant, contended that wherever it appears that the plaintiff is not entitled to his action, no pleading over, nor verdict can cure the defect. That it was clear on this count, that the whole estate of *Maurice Bailey* the grandfather was devised;

devised; no reverter was left in him. Both the grandsons took by purchase, the only way in which they could take; an estate for life being limited to the father, with remainder to them in fee. But no purchaser can maintain an action in which he must count on a *seisin in the ancestor*; for a *seisin* in the ancestor means only a *seisin* in the person from whom there is a *descent*. Neither can the demandant, in the present instance, maintain his action, not being able to shew an *actual seisin* in the *devisee* under whom he claims.

Per Curiam. In order to maintain a writ of right, the demandant must shew an *actual seisin* either in himself or his ancestor, by taking the *oathes*. The present case has neither of these requisites. The demandant does not state that either he or *John the grandson*, under whom he claims, were ever *so seised*.

Judgment arrested.

1788.

DAILY
againſt
KING.

BEAVAN *against* DELAHAY and LEWIS.

REPLEVIN—for taking corn on the 20th of September 1784, at *Peterchurch* in the county of *Hereford*.

A custom that a tenant may leave his away-going crop in the barns &c. of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the determination of the term: [notwithstanding the statute 8 Anne c. 14 s. 6, 7.]

Avowry and cognizance—*Locus in quo* part of certain lands, &c. of which the avowant *Delahay* was seised in fee, and which he demised on the 2d of February 1780, to one *William Beavan* for one year, and so from year to year as long as both parties should please, at the rent of 168 l. payable half yearly. *William Beavan* entered on the 3d of February 1780, and continued in possession till the 2d of February 1784, when the demise ended. Within the parish of *Peterchurch* an ancient custom, That every tenant and farmer of any lands, under any demise, from year to year, at the will of the parties, shall have to his own use, and reap at seasonable and proper times, his *away-going crop*, that is, all the corn growing upon the said lands, which, before the expiration of such term, hath been sown by such tenant and farmer, upon any part of such lands, being arable land, not exceeding one third part of the arable lands so held under such demise, and which hath been left standing and growing upon such lands at the expiration of such term; and also deposit such *away-going crop*, when reaped, in the barns and out-houses, if any such there be, parcel of such demised premises convenient in that behalf, and thresh the same there, and keep the same in the grain there then

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arising,

1788. arising, in such barns and out-houses, until the first day of May next after the reaping of such corn. On the 1st of August 1784, William Beavan the tenant reaped his away-going crop, and placed and deposited the same in the said places in which, &c. being the barns and out-houses parcel of the said demised premises, and kept it there till the said time when, &c. which was before the 1st of May next after the reaping of the same, under the custom—rent arrear, distress, &c.

BEAVAN
against
DELAHAY
and An-
other.

Plea in bar—protesting, no such custom, confesses that the demise ended on the 2d of February 1784, but says that the said goods and chattels were taken and distrained after the expiration of six calendar months next after the end and determination of the said demise, &c.

To this there was a general demurrer.

Lawrence, Serjt. in support of the demurrer, argued that although the distress was taken after six months had elapsed from the determination of the demise, yet the landlord had a good right to distrain. The case in *Keilway*. 96. a. is an express authority in point.—The tenant had an interest in the premises upon which the distress was so taken, by the custom of the country. By the Feudal Law, non-payment of rent, and non-performance of services occasioned a forfeiture of the feud. But in process of time, the remedy by distress was substituted lieu of forfeiture. (*Gilb. Law of Replevin*, p. 3.) Wherever therefore a forfeiture might be incurred, there a distress might be taken. In the present case the tenant might have forfeited, by several means, the interest which the custom gave him, and being so liable to forfeiture, he was also liable to distress. In 1 *Roll. Abr.* 670. pl. 10, it is laid down, that the landlord cannot distrain after the end of the term, because there is no privity of estate between him and the tenant, but this admits, that where there is such privity, a distress may be taken; and in the case before the court there is such privity by the operation of the custom. In the case of *Stanfill v. Hickes*, 1 *Ld. Raym.* 280. it was determined, that there could be no distress, where the tenant had different interests in the estate, which implies, that where the interests of the tenant are the same, the landlord has a right to distrain; here, there is a continuation of the same interest, the custom of the country extending the term till the day specified. That such a custom is good appears from *Wiglesworth v. Dallison*, *Dougl.* 201. and the case of *Lewis v.*

Harris, tried before Chief Baron *Skyner*, at *Hereford* Summer assizes 1778 (a). 1788.

Kerby, Serjt. contended that the avowry was inconsistent, as it states the term to have ended on the 2d *February* 1784, and that *until* that time the tenant continued in possession; and sets up a custom that he should keep possession of the barns, &c. for the putting in his corn till the first of *May*, after the reaping of the corn.—By the statute 8 *Anne*, c. 14. s. 6. a power is given to landlords, which they had not at common law, to distrain after the expiration of the term granted, but it is expressly limited by the 7th section, to the period of six months after such expiration. In the present case it appears by the avowant's own statement, that the distress was taken contrary to the statute, being long after six months had expired subsequent to the determination of the demise.

BEAVAN
against
DELAHAY
and An-
other.

The case in *Keilway* ought to have little or no weight, as it has been contradicted by the legislature in the 8th of *Anne*, and as it appears to have been against the opinion of two judges of the court in which it was decided. It is also an anonymous case, and does not shew upon what occasion it came before the court.

The case of *Wiglesworth v. Dallison* proves only the goodness of a custom to take away an off-going crop after the expiration of the term; it does not establish a right to distrain six

(a) *Lewis v. Harris*, Summer Assizes at *Hereford*, before Chief Baron *Skyner*, 1778.

Trover for a quantity of wheat—Plaintiff proved the taking and conversion.—Defendant justified under a distress for rent. The distress was made in *March*, the Term having ended the *Candlemas* twelve-month before; but it was during the time the wheat was in a barn, part of the demised premises, and also during the time allowed by the custom of the country to the off-going tenant to get in and dispose of his off-going crop.

Kenyon, for the defendant, insisted, that the tenant's right to these advantages was a continuance of his term in that part of the lands to which it extended, and was, as it were, an excrescence of his term. Therefore the distress was during the term, though more than six months after it had expired in the rest of the farm.

Beacroft insisted, for the plaintiff, that it was bad by common law, and not within the statute 8 *Anne*, c. 14. s. 7.

Chief Baron SKYNER.—The question is new to me; I must resort to the reason of the thing. The tenant entered originally on part only, and could not have the benefit of the residue. During his right to continue he was immediate tenant, and could have maintained trespass while his customary right continued. ("He offered *Beacroft* a case for the opinion of the Court, but the matter being of small value, it was, with *Kenyon*'s consent, reserved for his further consideration, and the Plaintiff had a verdict subject to his opinion.")

He afterwards continued of the same opinion, and a nonsuit was entered.

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months

1788. months after the term has expired, against the express authority of an act of parliament, nor does it authorise a tenant to keep possession of a barn, &c. after the expiration.

BEAVAN
against
DELAHAY
and An-
other.

The case of *Lewis v. Harris* was trover by the tenant against the landlord, in which the tenant claimed to hold the premises beyond the term, who ought therefore to submit to all the powers which a landlord has over a tenant. There the Chief Baron went into the equity of the case, saying, that as the tenant did not come into possession of part of the premises, till after the commencement of the term, it was but just that he should continue, after it ended. At best that was a mere *nisi prius* decision, which appears to have been acquiesced in, because the value of the corn was too small to hazard any further expence.—The case of *Stanfill v. Hickes* is strongly in favour of the present Plaintiff, which lays it down, that where the tenant has two interests in the premises, no distress can be taken. Here the tenant had two different interests, one arising from the demise, and the other from the custom, supposing the custom to be good.

Lawrence in reply.—The term was continued by the custom of the country till the 1st of May after the harvest; and if it continued for one purpose, it must also continue for every other. As the tenant might hold possession of the barn, &c. so all the rights of the landlord attached upon him, and with those rights, that of distress.

The Court took a few days to consider, after which

Lord LOUGHBOROUGH delivered their opinion as follows:—A few short principles are sufficient to determine the present case. If by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract, must also be continued. It has been often determined, that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease. The rights therefore of the landlord must in such case continue. Now it is not material whether the interest and connection between the landlord and tenant be extended, by such holding over, or by the operation of a custom like the present.

I have seen Sir *John Skynner*, and consulted him on the case of *Lewis v. Harris*, which I find was correctly stated at the bar. On that case he took the opinions of all his brethren of the
Exchequer

Eschequer, who agreed with him in his decision, which was acquiesced in, and never afterwards called in question. 1788.

Judgment for the defendants.

BEAVAN
against
DELANAY
and An-
other.

THOROLD *against* FISHER (2).

THE rule to bring in the body expired on *Saturday* the 19th of *April*, on *Monday* the 21st, defendant's bail were justified;—On the same day *Runnington*, Serjt. moved for and obtained an attachment against the sheriff for not bringing in the body.—On a subsequent day *Bond*, Serjt. obtained a rule to shew cause, why the attachment should not be set aside with costs.—*Runnington* now shewed cause, contending, that by the known practice of both this Court, and the King's Bench, as soon as the rule for bringing in the body expired, immediately the sheriff was in contempt and fixed, and that the defendant could not afterwards put in bail without special leave from the Court.—To this *Bond* answered, that the bail were justified before the attachment was moved for, which was therefore irregular. The Court referred to the prothonotary as to the practice, who said, “That though the rule for bringing in the body had expired, yet if the defendant justifies his bail before the Plaintiff moves for an attachment, the sheriff is not liable to the attachment.”

Though the rule to bring in the body has expired, yet if the defendant justifies bail, before the plaintiff moves for an attachment against the sheriff, it is in time to prevent the attachment.

Rule absolute with costs.

(a) [The practice of the court of K. B. differs in this instance from that of the Court of C. P.; and so it was stated in *R. v. Middlesex (Sheriff)*, M. 39 G. 3. Term Rep. B. R. vol. 8. p. 29. where the Court of K. B. held, that if the sheriff be once in contempt for not bringing in the body, that contempt is not purged by the defendant's surrendering

on a subsequent day, though before an attachment be moved for against the sheriff.—See in affirmance of the Practice of the Court of C. P. *Weddall v. Berger*; and *Williams v. Waterfield* M. 29 G. 3. Bof. & Pul. 325. 334; and Mr. J. Buller's observation in the latter case.]

FANO *against* COKEN.

THE defendant was served with a *clausum fregit* returnable in four weeks from *Easter Day*. The return day was *Sunday*, *April* 20th. The defendant not appearing on the *Wednesday* following, the plaintiff on the *Thursday* sued out a *distingas*. On that day the defendant entered an appearance. On *Friday* morning the plaintiff's attorney levied 40 s. under the *distingas*, on the defendant's goods.

The return day of a *clausum fregit* and the *quarto die post*. are both reckoned inclusively.

Kerby, Serjt. obtained a rule to shew cause why these issues should not be repaid to the defendant with costs, on the ground

that There is no difference whether the return day be on a *Sunday* or any other day.

1788. that the return day being *Sunday*, the defendant had till *Thursday* to appear, and as the *disfringas* issued on *that day*, it was irregular.

*Fano
against
Coke.*

To this it was answered, that by the uniform practice of the court, the defendant was bound to appear *within* four days of the return of the writ, which are *inclusive* both of the return day and the *quarto die post*, and that *Sunday* was to be considered like any other return day.

The Court, after consulting the secondaries as to the practice, were of opinion against the defendant.

Rule discharged.

COOKE *against* DOBREE.

An affidavit to hold to bail, must shew how the debt arose. The court will not stay proceedings against the defendant till the debt and costs recovered by him in a former action against the plaintiff, be paid.

KERBY, Serjt. moved to discharge the defendant out of custody, and to deliver up the bail bond, on entering a common appearance, there being a defect in the affidavit to hold to bail.—The affidavit was, that the defendant was indebted to the plaintiff “*in the sum of 500 l. and upwards.*”—The objection was, that it did not appear *how the debt arose*.—On this the court granted a rule to shew cause.—He then prayed that the proceedings might be staid in this action, till the debt and costs in two other actions for which the defendant had obtained judgment against the plaintiff, should be paid.—This was prayed upon an affidavit, stating the judgment in those actions, that the defendant had never since their commencement had any dealings with the plaintiff, and that the present action was founded on the same circumstances with those others.—But

The Court refused, saying that they could not on motion try the merits of the cause.—

Bond, Serjt. then proposed a supplemental affidavit, on the part of the plaintiff, which was also refused, and afterwards the

Rule made absolute.

WARD *against* SNELL.

A prisoner suing as a party grieved on the *habeas corpus act*, a copy of the warrant of commitment being refused him, having recovered the penalty, is entitled to costs.

DEBT for the penalty of the *habeas corpus act*, 31 Car. 2. c. 2. s. 5. against the defendant who was keeper of *Colchester* gaol, for refusing the plaintiff (being the party grieved) a copy of the warrant of commitment.

warrant of commitment being refused him, having recovered the penalty, is en-

Plea

Plea *nil debet*.—Verdict for the penalty 100 *l.* but no damages nor costs.

1788.

Marshall, Serjt. having obtained a rule to shew cause why the prothonotary should not tax the plaintiff his costs, and why the associate should not indorse them on the *postea*, argued in support of it.

WARD
against
SNELL.

That the first case which arose on the (a) statute of *Gloucester* was (b) *Pilfold's* case, which, if it seem to militate against the plaintiff in this action, has been in great measure contradicted by *Ld. Coke* himself (c), and shaken by modern decisions (d).

The present action is not brought for damages, but for a *certain penalty*, given to the party grieved. Now where a statute gives a *certain penalty*, the party recovering such penalty must also recover *costs*, because, as the penalty is intended for a *recompence* to the party grieved for the damage he has received; if he could recover no more, it often would be in vain to sue, since his costs would exceed the penalty. But where a statute gives no certain penalty but only *damages*, such statute is introductory of a new law, and gives a remedy where there was none at common law, in which case no costs shall be recovered; the reason is, no certain sum being specified, the jury may give a full compensation in damages.

It is an established rule of law, that where a *penalty* is given to a party grieved, he shall have his costs; as appears from *North v. Wingate*, *Cro. Car.* 559.—1 *Roll. Abr.* 574.—*Eton v. Barker*, 1 *Ventr.* 133.—*Corporation of Plymouth v. Collins*, *Carth.* 230. *Company of Cutlers v. Ruslin*, *Skynn.* 363.—*Bellasis v. Burbriche*, 1 *Ld. Raym.* 172.—*Shore v. Madiston*, *Salk.* 206.—*Greetham v. Inhabitants of Theale*, 3 *Burr.* 1723.—*Gynes (qui tam) v. Stephenson*, *Coke's Cases of Practice* 87.

But even admitting the authority of *Pilfold's* case, yet the plaintiff may have his costs, consistently with that case, which says, "That where a statute, since the statute of *Gloucester*, in "a new case gives damages, the plaintiff shall not recover costs, "this being an act which creates a recompence, where there was "none before." Now the plaintiff is entitled to damages for the detention of the penalty, by common law, *Cro. Car.* 559. 1 *Vent.* 133.

(a) 6 *Ed. 1. c. 1.*(b) 10 *Rep.* 116.(c) 2 *Leis.* 288.(d) *Wilkes v. Hill*, 2 *Will.* 91.—*Jackson v. Inhabitants of Calfebury*, *Term Rep. of B. R.* vol. 1. p. 71.

before

1788. before cited, which also shews that he is entitled under the very terms of the statute of *Gloucester*, which are, "This shall hold
 " place where the party is to *recover damages*."

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 against
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He might also have recovered damages at common law on another ground (a). The offence of obstructing bail, is punishable at the suit of the party, as well as by indictment. Now it is necessary for a prisoner to have a copy of his commitment, in order to be more speedily bailed, otherwise the *habeas corpus* act would not have made it so penal to refuse it; the refusal therefore is an obstruction of bail. If a person in a distant part of the kingdom were committed to gaol for a misdemeanor, without knowing the cause of his commitment, and forced to sue out a *habeas corpus*, in such a case he would have been prevented from being bailed; for had he known by a copy of the warrant, that it was for a misdemeanor, any justice of the peace might have bailed him.

Bond, Serjt. against the rule, contended, that *Pilfold's* case ought to be relied on as law.

That case distinguishes statutes of *addition*, from statutes of *creation*, and lays it down, that on those of the *latter* description, costs are not recoverable. That case ought to govern the present. The *Habeas Corpus* act is a *creative* not an *accumulative* statute, giving a *new remedy* to the party suing, to which he was not entitled at common law. There are no instances of an action at common law having ever been brought, for the injury against which that act provides a remedy. If then no action would lie against the Defendant at common law, the *habeas corpus* act cannot be included among those statutes which give costs, according to the description in *Pilfold's* case, viz. "*such as increase the damages and costs given by the common law*." Nor does the present case fall within the *stat. of Gloucester*, which gives costs only where *damages* were before to be recovered. There is no more reason to consider the *habeas corpus* act as an *accumulative* statute, than the statutes of *waste* (b), or of *tithes* (c); in neither of which cases the party could recover costs, till the legislature expressly interfered for that purpose. Where costs are meant to be given *together with a penalty* by a statute, they are expressly mentioned, as in the statute 23 H. 6. c. 14. for the regulation of the return of members of parliament, the words of which are, "*The said 100 l. (the penalty, &c.) with his costs*

(a) *Hawk. P. C.* 90.

(b) 6 *Ed. 1.* c. 5.

(c) 2 & 3 *Ed. 6.* c. 13.

" *spent*

" *spent in that case*. So in the statute of 7 & 8 *W.* 3. c. 7. on the same subject, costs are distinctly given besides the penalty. When therefore no mention is made of costs in a penal statute, it is to be inferred, that the legislature meant to exclude them. 1788.

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LORD LOUGHBOROUGH saw no reason to doubt the authorities cited in support of the plaintiff's right to costs. The statute of *Gloucester* is a remedial act, and ought to have a favourable interpretation. The penalty in the present case accrues to the party grieved before action brought, who having recovered a debt, is entitled to the costs attending such recovery.

GOULD, J. of the same opinion—costs are in the nature of a satisfaction.

This is not a popular action; it is like an action on a bond to recover a debt already due, a right of action vests in the party grieved as soon as the grievance is committed; but it is otherwise of a common informer, who has no interest till judgment.

HEATH and WILSON, Justices, of the same opinion.

Rule absolute (a)

(a) [See the opinion of the Court of K. B. in *Tyte v. Glade*, Term Rep. B. R. vol 7. p. 268; that wherever an action is given to the party grieved, by an act since the statute of *Gloucester*, he is entitled

to costs if he succeed, though he had no remedy before such act.]—See also *Williams q. t. v. Drew*, and *Plymouth (Mayor) v. Werring*, Willes's Rep. 392. 440. S. P.

WALLACE against KING and Others.

THIS was an action on the case for selling goods distrained for rent in arrear, before five days had expired next after the distress was taken and notice given. The declaration consisted of three counts—The first count was for an excessive distress; the second, for an irregular distress; and the third was in trover for the goods distrained.

Plea, general issue—Not guilty.

The cause came on to be tried before Lord Loughborough at the Sittings after last *Hilary* Term at *Westminster*.

At the trial it appeared that the plaintiff held three rooms of the defendant *King*, in *Oxford-Street*, in the parish of *St. Mary-le-bone*. That three quarters of a year's rent being in arrear, the defendant *King*, together with the defendants *Freeman*, *Coxer* and *Wenham*, (who were assistants to *King*), on *Saturday the 12th of May 1787*, distrained the plaintiff's goods, made days allowed before a distress can be sold, are *inclusive* of the day of sale. *Qu.* Whether goods distrained in the parish of *A.* can be appraised by appraisers sworn before the constable of the parish of *B.* each parish being in the same hundred but in different divisions, and each having different constables?

Trover will not lie for goods irregularly sold under a distress; the statute 11 *Geo 2. c. 19.* § 19. having declared that the party selling should not be deemed a trespasser *ab initio*, and having given an action on the case to the party grieved by such sale. The five

an

1788. an inventory, and gave a regular notice of sale. On *Thursday* afternoon, *May* the 17th, they removed the goods and sold them. The appraisement was made by appraisers, who were sworn before one *John Wood*, who was *constable of the parish of St. George's, Hanover Square*, and not for the parish of *St. Mary-le-bone*; and who was chosen by the vestry of *St. George's*, and returned and sworn in constable at the lect of the dean and chapter of *Westminster*. It was proved that the parishes of *St. Mary-le-bone* and of *St. George's*, were both in the hundred of *Offulstone* (which has five divisions, viz. *Holborn, Finsbury, The Tower, Kensington, and Westminster*), but that *St. Mary-le-bone* was in the *Holborn* division, and *St. George's* in the *Westminster* division, and that no part of *Westminster* extended into the parish of *St. Mary-le-bone*.

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It was contended at the trial, by *Bond*, Serjt. 1st, That the defendants could not legally sell the distress before *Friday, May* 18th, as the party distrained must have full five days to replevy his goods in, next after the distress was taken and notice given (a). 2dly, That the appraisement was not regular, not being under the inspection "of the constable of the hundred, parish, or place where such distress was taken."

Lord LOUGHBOROUGH thought these points proper to be argued in court, and also whether trover would lie. He therefore directed a verdict to be entered on the count in trover for the value of the goods, and that the Court should be moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered.

A rule to shew cause having been obtained, *Bond*, Serjt. argued that the statute of 2 *W. & M.* (b) the first act which gave landlords a power to sell the tenant's property, had, out of mercy to the tenant, allowed him five full days in which he might make replevin. In order therefore to give effect to the intention of the statute, those five days must be reckoned *exclusive* both of the day on which the distress was taken, and also of the day when the sale was made.

But this objection the Court over-ruled, saying, that on the *Thursday* afternoon, five days from the time of the distress, had completely expired.

He then argued, that where a constable, without any special warrant from a magistrate, is intrusted with the execution of any powers, either by common law or by statute, he can only exe-

(a) 2 *W. & M.* sess. 1. c. 5. s. 2.

(b) *Sess.* 1. c. 5. s. 2.

tute them within the parish or district of which he is appointed constable. For this he cited 2 *Ld. Raym.* 1296, the *Queen v. Tooley*, 1 *Salk.* 175, *case of the village of Chorley, Foster's Crown Law* 312, 2 *Blac. Rep.* 1135. *Hill v. Barnes*, and *Blatcher v. Kemp* (a), (tried before Lord Mansfield on the Home Circuit, at the Summer Assizes 1782). The defendant, in the present case, could not be supposed to have authority in the county at large, as he was appointed under a particular franchise, at the leet of the dean and chapter of *Westminster*. The statute 2 *W. & M. c. 5.* directs that the overplus or the money arising from a sale of the distress, shall be left in the hands of the known officer of the district, but by no means intended that a stranger should interfere. If it were permitted to the constable of one parish, to

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(a) *Blatcher v. Kemp*, *Maidstone Summer Assizes*, 1782.

This was an action of trespass for entering the plaintiff's house. The defendant had acted under a warrant from a justice of peace to search for nets, the warrant on being produced was directed to "The constable of *Skipborne*, to *Samuel Carter*, and to all other officers of the peace in the county of *Kent*." Evidence was given that the defendant was borougher of the hundred of *Little Peckham*, which adjoined to the hundred of *Skipborne* in which the plaintiff's house was situated.

Peckham for the defendant, contended that he was constable for the county, and came within the warrant, which was directed to all officers of the peace in the county of *Kent*.

Ervine and *G. Bond* for the plaintiff argued, that when a justice directed a warrant generally to a constable of a given district, and all other peace officers within the county, it was *reddendo singula singulis*, to the constable of each district in the county, according as the warrant might require execution in any part of the county. But no justice could by such a warrant authorise a constable of one hundred to act in another, without specially appointing him so to do. This was a wise and politic regulation, for if the execution of warrants were given to mere strangers, force would often be repelled by force, and infinite mischief would attend the departure from the ancient rules of local magistracy. If the defendant, not being constable of *Skipborne*, had been required to execute the warrant and had refused, he could not have been punished for his refusal. He was only a volunteer, neither generally described in the warrant nor specially named, and was not entitled to notice under the statute.

LORD MANSFIELD.—This is a most unjust action, the plaintiff having received no sort of damage, and the defendant having acted *bonâ fide*. I therefore wished much to get rid of it. But the law is correctly brought to my recollection, and I am sorry to find it with the plaintiff. No constable can act under a warrant, out of his district; it is certainly to be taken, *reddendo singula singulis*. I remember a famous case at *Norwich*, where it was so determined. The reasons given by the counsel for the plaintiff are good ones; they weighed with me in the *Norwich* case. This warrant is directed "To the constable of *Skipborne*, to *Samuel Carter*, and to all other peace officers;" the defendant is neither constable of *Skipborne*, nor *Samuel Carter*, and the general direction is to be taken to each within his district. Therefore as the warrant was not directed to the defendant, he cannot justify under it, and the plaintiff must have a verdict for 1s.

step

1788. interval between the month of *March*, when the mare was sold to the plaintiff, and *October*, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. The jury found a verdict for the plaintiff with 30 guineas damages.

FIELDER
against
STARKIN.

Le Blanc, Serjt. having obtained a rule to shew cause why the verdict should not be set aside and a non-suit entered;

Adair, Serjt. shewed cause. Three questions arose in this case upon which the jury had a right to decide. 1st, Whether there was a warranty from the defendant to the plaintiff?—2d, Whether such warranty was true or false?—3d, Whether the plaintiff returned the mare to the defendant and gave him notice of being unsound within due time? These were clearly questions of fact, which it fell within the province of the jury to determine. Although it has been sometimes considered as a question of law, what shall be reasonable notice and due diligence, yet in the present case, whether the plaintiff returned the mare and gave notice of her unsoundness in due time, was a question of fact, depending upon the situation of the parties, their places of abode, and the facility of communication between them. As the jury have decided in favour of the plaintiff upon these facts, the court will not now interfere. It is plain that the jury gave no credit to that part of the evidence which tended to shew, that the plaintiff and defendant were seen together after the mare was discovered to be unsound, and that the plaintiff at that time neglected to give notice to the defendant. This neglect, if it had been proved, would have been perhaps a waiver of the right to return the mare, but as the verdict is found, this evidence must be taken to be false. The jury have exercised a discretion, which they have a right to exercise, of believing or disbelieving any part of the evidence, and of which discretionary power many instances have occurred.

Le Blanc in support of the rule, confined himself to the question, Whether the plaintiff had used due diligence to return the mare to the defendant, and had given reasonable notice of her being unsound? This he argued was a question of law, arising out of facts. The undisputed facts were, that the plaintiff had early discovered the unsoundness of the mare, but he took no pains to make inquiry for the defendant, to give him notice of the mare being unsound, or to return her, till six months after

after he knew she was unsound. The inference of law from these facts must be, that he has not used due diligence, nor given reasonable notice to the defendant. This is like the case of a bill of exchange being dishonoured, where it is necessary in order to make the indorser liable, that the holder of the bill should use due diligence and give reasonable notice to the indorser. But in such case what is due diligence and reasonable notice, is a question of law arising from particular circumstances (a).—The plaintiff in the present case, was so far from returning the mare in proper time after he knew her to be unsound, that he endeavoured by every method to cure her, and exerted the highest act of ownership, by selling her to a third person.

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LORD LOUGHBOROUGH—Where there is an express warranty, the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been *at that time unsound*, it is not necessary that he should be *returned to the seller*. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, *without either a return or notice*. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the original seller, to recover the difference of the price. In the present case it appears from the evidence of the farriers who saw the mare opened, that she must have been unsound at the *time of the sale to the plaintiff*.

GOULD, J.—of the same opinion, remembered many cases of express warranty, where a return was not held to be necessary.

HEATH, J.—If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

WILSON, J.—of the same opinion, recollected a cause tried before Mr. Justice Buller at *nisi prius*, where the defendant had sold

(a) *Tindal v. Brown*, Term Rep. B. R. vol. 1. p. 167.

1788. the plaintiff a pair of coach horses and warranted them to be six years old, which were in reality only four years old. It was contended that the plaintiff ought to have returned the horses; but Mr. Justice *Buller* held, that the action on the warranty might be supported without a return (a). As to part of the evidence being contrary to the verdict, the jury have a right to use their discretion either in believing or disbelieving any part of the testimony of witnesses.

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Rule discharged.

(a) See *Term Rep. B. R.* vol. 1. p. 136. [and vol. 2. p. 745.]

ALEXANDER against COMBER.

The statute of frauds will prevent a parol agreement to buy goods without either earnest or delivery, from giving the buyer any property in them. In such case, therefore, the buyer cannot maintain trover, against the vendor who sells them to another person. Where a sale is not immediate, it is not within that statute.

TROVER for sheep—Tried before Mr. Justice *Grose* at the last assizes at *East Grinstead*. It appeared that the plaintiff had agreed to buy the sheep of the defendant at *Lewes* fair, and to take them away at a certain hour. There was no money paid, nor any sheep delivered. The plaintiff not coming at the appointed time, nor sending to take the sheep, the defendant sold them to another person. Verdict for the plaintiff.

A rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered;

Bond, Serjt. argued against the rule, that as the sheep were sold to the plaintiff, there was a sufficient property in him to maintain the action; and as they were re-fold by the defendant, a sufficient conversion on his part.

But the Court held, that the statute of frauds prevented any property from vesting in the plaintiff, so as to enable him to maintain trover, there being neither earnest, delivery, nor agreement in writing.

WILSON, J.—observed, that where a sale is not immediate, it is not within the statute of frauds, such as a contract to purchase a carriage when it shall be built, and the like (b).

Rule absolute.

(b) See 4 *Burr.* 2101. *Gloyton v. Andrews*.—1 *Strange* 506. *Towers v. Sir John Osborne*.—[But see *Rondeau v. Wyatt*, post. vol. 2. p. 63—68., in which it was held by Lord *Loughborough*, and *Gould and Haib* Justices, (Mr. Justice *Wilson*, then absent as a Commissioner in Chancery, dissenting), that an executory agreement is within the statute; even though it had been admitted by the defendant in his answer to a bill in Chancery, filed for the performance. See also the case of *Whaley v. Bagenal*, on the *Irish* Statute of Frauds. *Parl. Cas.* 8vo. edit. i. 345.]

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CAMDEN, CALVERT, and KING *against* EDIE.

THE plaintiffs having brought twenty five actions on a policy of insurance against the defendant and others, a rule was obtained to consolidate; by which it was ordered (among other things) that the defendants should be at liberty to prosecute a bill filed by them in the Exchequer, upon their undertaking not to file any other bill against the plaintiffs for an injunction, nor to bring "*any writ of error.*"

The cause went to trial, and a verdict was found for the plaintiffs for a total loss. The costs were taxed and paid by the defendant's attorney, and the damages settled between the parties themselves, who had an open account with each other. All the other defendants (except one, who became a bankrupt) paid their subscriptions.

The plaintiff's attorney was afterwards served with an allowance of a writ of error in this cause; upon which a rule was obtained in *Easter* term last to shew cause why an attachment should not issue against the defendant's attorney for contempt, and breach of the consolidation rule, and why all further proceedings on the allowance of the writ of error, should not be stayed. On shewing cause against this rule, it appeared by the affidavit of the defendant's attorney, that he had consulted some very eminent counsel, who gave it as their opinion, that there was manifest error in the record; upon which, and also conceiving that the defendant was only bound by the rule not to bring a writ of error *for delay*, he brought the writ of error in question, the damages and costs being previously satisfied.

On this the Court called upon the defendant's counsel (who were *Bond, Cockell, Runnington, and Marshall*, Serjts.) to point out the error on the record.

They stated the stat. 25 G. 3. c. 44. which enacts, "that no person or persons shall make any policy of assurance, without inserting in such policy, his, her, or their own name or names, as the person or persons interested therein," &c. and that every policy made "contrary to the statute, should be void." By the declaration it appeared that the action was brought jointly by the plaintiffs *Camden, Calvert, and King*, stating that they caused to be made a policy, purporting thereby, and containing

Defendants having agreed under a consolidation on rule not to bring any writ of error, cannot do so, though there be manifest error on the record. But the court will not grant an attachment against the attorney for having brought such writ of error, if it appear that it was not done *for delay*, and that he was led into a mistake.

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CAMDEN
and others
against
EDIE.

taining therein, that "Messrs. *Camden and Calvert* (leaving out "*King*") as well in their own names as in the name and names "of every other person," &c. &c. and averring that the assurance *so made* was made for the benefit and on the account of them (the plaintiffs), and that they were *interested* in the premises, &c.

This omission of the name of *King* in the policy, as stated in the declaration, was a radical defect, which nothing could cure, inasmuch as it avoided the policy itself (a). Though there was no authority decided expressly on this point, yet it was the general opinion of persons conversant in actions of this sort, that the terms of a consolidation rule only were meant to restrain the party from bringing a writ of error *merely for delay*, but not to extend to any manifest pregnant error on the record. That the writ in the present case was not brought for delay, was evident, as the damages and costs were paid immediately after the verdict.

Adair, Le Blanc, and Lawrence, Serjts. for the plaintiffs, in support of the rule, contended that by the terms of the rule the defendant was bound generally not to bring *any writ of error*; the meaning of which was, that after a fair trial had been obtained, and substantial justice done, *no writ of error* whatever should be brought. It was like a release of all errors in a warrant of attorney. In a legal impediment like the present, where the error is against the justice of the case, the Court will bind the party down to the terms of his consent. The rule is an undertaking to abide by whatever, from the event of the trial, should appear to be the justice of the case. The defendant may resort to equity for any purpose, except that of an injunction, if there are any real merits. But this proceeding is contrary to good faith. If the plaintiff had been aware of the error pretended, he might have precluded it expressly by the rule, or gone on with all the other actions. If the Court should allow this writ of error to be brought, the plaintiff will remain without redress, as the policy was vacated and discharged. On a Judge's order to plead issuably, a defendant is not permitted to plead the statute of limitations, which, though a legal, is not a

(a) *Wilton and others v. Re-fon*, tried at *Guildhall*, after *Michaelmas* term 1787.—There were several plaintiffs, and policies made in the name of "*Mr. William Wilton and the rest of the owners*," &c. Mr. Justice *Buller* held the policy was void under the statute 25 G. 3. c. 44.

conscientious

conscientious plea. So far from this rule relating only to errors *for delay*, that if the words "*for delay*" had been inserted, they should have objected to them. *Executors of Wright, Bart. v. Nutt, Term Rep. B. R.* vol. 1. 338.

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An affidavit was read of the plaintiff's attorney, that the defendants were partners at the time of effecting the policy, and as such, jointly interested in the ship and cargo.

Lord LOUGHBOROUGH—It is contrary to justice to permit the defendant to proceed in the writ of error, since he has by his own act and consent prevented the plaintiff from pursuing the common course of law in the other actions.

Cur. vult advis.

In this term the Court said, it was not regular to take notice of the extra opinions of counsel, yet, as the attorney appeared to have been led into a mistake; they discharged that part of the rule which related to the attachment against him, but made the other part absolute with costs, for staying the allowance of the writ of error.

SCHOOLE *against* NOBLE, LETT, and BYRNE.

THE plaintiff brought trespass against the defendants for breaking and entering his house, &c. Defendants *Lett* and *Byrne* had suffered judgment to go by default. *Noble* went on to trial, and obtained a verdict. Damages were assessed against *Lett* and *Byrne* at one halfpenny each. On which, *Runnington*, Serjt. obtained a rule to shew cause why the costs, which might be taxed against *Lett* and *Byrne* on the judgment by default, and the damages assessed, should not be deducted out of the costs taxed to *Noble* on the postea, and allowed to the plaintiff, and in the mean time execution against them stayed.

Where there are many defendants, and some go to trial, and obtain a verdict, but others suffer judgment by default, the court will permit the costs and damages on the judgment by default to be deducted from the costs taxed on the postea to those defendants who had a verdict. An attorney has only such a lien on the costs, as is subject to the equitable claims of the parties in the cause.

This was moved on an affidavit, stating that the defendants *Lett* and *Byrne* had acted under the authority of *Noble*, who had undertaken to pay the damages and costs.

Bond, Serjt., against the rule, said, that this was a new application, and against justice, inasmuch as it tended to deprive the attorney of that lien on the costs, to which he was legally entitled. But

costs, as is subject to the equitable claims of the parties in the cause.

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The Court held that the attorney could only have such a lien on the costs as was subject to the equitable claims of the parties in the cause, and therefore made the

Rule absolute (a).

(a) See 3 *Will.* 396. *Barker v. Brabam*.
—2 *Blac.* 826. *Thrustout d. Barnes, v.*
Crafter.—[See also post pa. 217. and vol. 2.
p. 440. 587. acc. But the Court of K. B.
have repeatedly determined that the attor-
ney's lien for his costs is general. See *Mit-*
chell v. Oldfield, 3 *Term Rep. B. R.* vol. 4.

p. 123. *Randle v. Fuller*, 6 *Term Rep.*
B. R. 456. *Glaister v. Hewer*, 8 *Term Rep.*
B. R. 70. and *Hall v. Ody*, 2 *Bos. &*
Pull. 28. in which latter case Lord Eldon,
C. J. of C. P. expressed his opinion of the
propriety of reconsidering the practice of
this court.

VERNON, Widow, against WYNNE, Bart.

The plaintiff
in replevin
may pay the
rent into
court for
which the
defendant
srows.

REPLEVIN—several avowries for rent arrear. *Running-*
ton, Serjt. moved for leave to pay 9*l.* into court, being
the rent specified in the third avowry, on payment of which, and
the costs of the action, all farther proceedings might be stayed.

Le Blanc, Serjt. shewed cause, contending that in this action
it could not be done, because it would be permitting a plaintiff
to pay money into court, which had never yet been known, an
indulgence of this kind having been always confined to de-
fendants.

Runnington, in answer, cited *Salk.* 597. *Gregg's* case, in
which an instance is mentioned of a plaintiff in replevin being
permitted to bring the rent into court; and *Richardson's Prac-*
tice of the Common Pleas, vol. 1. p. 157. He contended that it
might be, and was done, in all actions where the demand was
certain, but not where the damages were unliquidated. *Salk.* 596.
Barnes's Notes, 429. That this was a reasonable application,
and the demand certain, was apparent from the defendant's own
avowry, which stated only 9*l.* to be due, the whole of which
the plaintiff offered to pay, with costs. *Kerby*, Serjt. *Amicus*
Curie, mentioned that he remembered in an action of trespass,
where the defendant had justified for non-payment of rent in
this Court, the plaintiff was permitted to pay the rent into Court.

Per Curiam—This is a reasonable application, and ought to
be allowed.

Rule absolute (a).

(a) See also 7 *Mod.* 147.

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DOE on the several Demises of THOMAS DAVIES and JAMES WILLIAMS, the Younger, *against* THOMAS WILLIAMS.

EJECTMENT for three acres of land called *Portway*, tried before Mr. Justice *Heath* at the last assizes for *Hereford*. The title of the lessors of the plaintiff was founded on an indenture of release of the 23d of *October* 1781, between *James Williams* the elder, *James Williams* the younger (the lessor of the plaintiff), and *Thomas Williams* (the defendant) of the first part; *James Maddey* of the second part; and *Thomas Davies* (lessor of the plaintiff) of the third part; by which the parties of the first part conveyed all that messuage, mill, and lands, called *Clock Mills*, in the possession of *James Williams* the elder, *James Williams* the younger, *Thomas Williams*, or some or one of them, and all lands and meadows to the said messuage or mill belonging, or used, occupied, and enjoyed, or deemed taken or accepted as part thereof, to *Thomas Davies* as a trustee for the payment of an annuity to *James Williams* the elder, for life, remainder to *James Maddey* for forty years, to raise portions, &c., remainder to *James Williams* the younger, in fee.

A deed of release containing the words "all land, &c." b-longing, used, occupied, and enjoyed, or deemed taken or accepted as part thereof, &c." will pass leasehold lands which answer that description, as well as freehold, especially against the releasor.

The lands in dispute were holden for the remainder of a term of 1000 years, but had been occupied with, and reputed part of the *Clock Mill* estate from the year 1748 to 1785.

In *May* 1785 the defendant got into possession; on whose part it was objected at the trial, that these lands being leasehold, did not pass by the release of 1781. The learned judge therefore directed a verdict to be found for the plaintiff, with liberty for the defendant to enter a nonsuit, if the opinion of the court should be in his favour.

Le Blanc, Serjt. having obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered; *Adair* and *Runnington*, Serjts. shewed cause.

Under the deed in question, the leasehold lands must be taken to pass as well as the freehold. The cases which have established the rule of law, that where the general words, "lands, tenements, and hereditaments," are used, freehold lands only will pass, have arisen on the construction of wills, containing no specific local description of other lands not freehold. Though it may be fair to in-

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Dor
on demise of
DAVIES and
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against
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fer, that where the enumeration of lands concludes with the word *hereditaments*, only lands of inheritance will pass, yet where in a deed there is so exact and specific a description as the present, there leasehold lands, which have in fact been holden with, and deemed part of the same estate with the freehold for a considerable length of time, must be included in that specification. If this be denied, the right of the grantor to convey them is denied; for as he has described *all the premises*, if the leasehold be not allowed to be included in that description, his right to include them is denied, and his intention frustrated.

Le Blanc, contra—The leasehold lands cannot pass by this deed, if either the nature of the conveyance or the words of it be considered. The nature of a lease and release is adapted to freehold, but not to leasehold estates; the proper conveyances of terms for years being by assignment.

The words "*all lands*," &c. must be construed to mean only freehold, since there are freehold lands sufficient to answer them.

In the construction of wills, where great latitude is allowed to the intention of the testator, it has been uniformly decided even against strong indications of intention, that where general and comprehensive words are used in the disposal of lands, if there be freehold lands to which those words will apply, such lands only will pass. If it be thus with respect to wills, much stronger will the case be with respect to deeds, where no particular regard is paid to intention. *Rose v. Bartlett, Cro. Car. 292. Day v. Trigg, 1 P. Wms. 285. Davies v. Gibbs, 3 P. Wms. 26. Knotsford v. Gardiner, 2 Atk. 450. Piffol on demise of Randal v. Riccardson, B. R. Hil. 24 Geo. 3. (a)*

LORD LOUGHBOROUGH—This being a case arising on a deed, is to be distinguished from those of a like nature which have arisen on wills. In general, where there is a question on the

(a) *Piffol on demise of Randal v. Riccardson, Hil. 24 Geo. 3. B. R.*

Ejectment for two leasehold farms in Cumberland, tried at Carlisle before Mr. Justice Buller. The case reserved stated, that one Christian Riccardson being seised in fee of several lands, and also possessed of the two farms in question for the remainder of two terms of 1000 years, devised "*all and every of his several lands, messuages, tenements, and hereditaments whatsoever, and wheresoever, whereto he was seised and interested in*" or entitled to, to his son for life, remainder to the heirs of his body. He then devised his *personal estate* to his wife and daughter, and made the wife sole executrix.

The question was, Whether the son took the leasehold lands by the above words of the will, or whether they were part of the personal estate?

After two arguments, Lord Mansfield delivered the opinion of the court, "That the leasehold lands did not pass to the son, but were part of the personal estate."

construction

construction of a will, neither party has done any thing to preclude himself from the favour of the court. But in the present instance the rule of law applies, that "a deed shall be construed most strongly against the grantor." For if it be determined that the lands in dispute did not pass by the release of 1781, the defendant will be permitted, after an interval of near forty years, to invalidate his own conveyance, for the purpose of obtaining an unjust possession.

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GOULD, J.—This not being the case of a devise, is not governed by *Rose v. Bartlett*, or the others cited. But even if a devise had been made in such specific and particular words as are contained in this deed of release, I should have very little doubt but that all lands would pass, as well leasehold as freehold. My lord has taken a just distinction between the construction of devises and deeds of conveyance, as to the equal favour to which both parties are entitled in the former, and the strictness which ought to prevail in the latter. The word "grant" is as proper to convey leasehold as freehold property.

HEATH, J.—of the same opinion.

WILSON, J.—The rule of construction established in *Rose v. Bartlett*, and the other cases, with regard to devises, does not extend to the present case of a deed. A conveyance by lease and release is certainly most properly used to pass estates of inheritance, but it may also convey a leasehold interest. If the leasehold lands had been expressed as such in this deed, they would clearly have passed; if the intention of the parties at the time was to convey them, they shall also pass. That such was their intention sufficiently appears from the circumstance of the case, and from the lands having been considered as part of the *Clock Mill* estate during such a number of years. The defendant, who was one of the grantors, shall not be suffered to deny the effect of his own deed.

Rule discharged.

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BALDWIN *against* TANKARD and others.

A judge's certificate that a custom-house officer "bad" "probable" "cause for" "seizing" "goods" does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under stat. 23 G. 3. c. 70. f. 29. and 26 G. 3. c. 40. f. 31.

TRESPASS against the defendants who were officers of the customs, for forcibly entering the plaintiff's house, breaking locks, doors, &c. making disturbance, &c. and seizing the goods, &c. to wit, one piece of printed callico, &c.

Plea not guilty.—The cause was tried before Mr. Justice ASHHURST, at the Lent assizes 1787, at *Aylebury*, and a verdict found for the plaintiff with 100*l.* damages. But the judge, being applied to by the counsel for the defendants, certified, "That there was a probable cause for the defendant seizing the goods."

In *Easter* term 1787, a rule was obtained to shew cause why the plaintiff should not enter up judgment, for his damages and costs, notwithstanding the judge's certificate.

This rule in *Trinity* term was enlarged till *Michaelmas* following, and in that term was further enlarged till *Hilary* term, when *Adair*, Serjt. argued, that as the judge had certified on the record a *probable cause of seizure*, under the statutes of 23 *Geo.* 3. c. 70. f. 29. and 26 *Geo.* 3. c. 40. f. 31. the plaintiff was entitled to no more than two-pence damages, besides the value of the goods.

In support of the rule, *Le Blanc* and *Lawrence*, Serjts. argued that the statutes, and the certificate of the judge extended only to *seizing* the goods, and not to any injuries accompanying the seizure, such as were charged in the declaration. The verdict is general, the several charges might have been distinguished on the separate counts, but the jury have found the defendants guilty of all, and having given above 40*s.* damages, the plaintiff is entitled to them and his costs.

Cur. vult adv.

In this term the Court declared their opinion in favour of the plaintiff, and made the

Rule absolute.

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LEWIS *against* PIERCY.

KERBY, Serjt. obtained a rule to shew cause, why the defendant, who was in execution, should not be discharged out of custody, on the following affidavit—

“ That the debt arose before he became a bankrupt, but that the verdict was obtained and the costs taxed after the bankruptcy, though before his certificate was allowed.”

An application having been previously made to Mr. Justice Gould for a discharge, he directed the Court to be moved, on a suggestion of the attorney for the plaintiff, that the costs having accrued *after* the bankruptcy, made a new debt.—*Kerby* argued that the costs were part of the original debt, and that as the defendant had obtained his certificate, his privilege extended to both.—*Boutefleur v. Coates*, Cowp. 25.—*Graham v. Benton*, 1 Wils. 41.

GOULD and WILSON, Justices, (Lord Loughborough and Heath, Justice, not being in court) said that the certificate seemed to them to extend to the costs as well as the debt itself.

Bond, Serjt. on shewing cause, did not urge that the costs were not to be considered as part of the original debt, but produced an affidavit, stating, that “ within twelve months before the bankruptcy, the defendant had lost 500*l.* by insurance in the *English* “ and *Irish* lottery,” which he said was within the statute 5 Geo. 2. c. 30. s. 12. and therefore deprived the defendant of any benefit of a certificate. But

The Court were clearly of opinion that insuring in the lottery was not gaming within the statute, and made the

Rule absolute for the defendant's discharge (a).

(a) *B. R. East*. 25 Geo. 3.—LONGFORD *against* ELLIS.

This was an action of slander. Verdict for the plaintiff.

Lew had obtained a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of *Leicestershire* upon common bail, as to this action, (he having obtained his certificate under a commission of bankruptcy) and in the mean time all proceedings be stayed.

The facts were,

That the action was brought for words spoken of the plaintiff in his trade, tried at the last Summer assizes at *Nottingham*, and a verdict for the plaintiff and 10*l.* damages.

That on the 28th of September 1784, between verdict and judgment, the defendant became bankrupt.

Where a debt arises before bankruptcy, but a verdict is obtained and costs taxed after the bankruptcy, the costs are considered as part of the original debt, and the certificate extends to both. Insuring in the lottery is not gaming within the stat. 5 G. 2. c. 30. s. 12. which will prevent a bankrupt's certificate being allowed.

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against
PERRY.

On the 5th December 1784 final judgment was signed, and increased costs taxed at 45*l.* 10*s.*

On the 27th January 1785, the plaintiff sued out a *resp. ca. fz.* into *Leicestershire*, upon which the defendant was taken.

Balgu, against the rule, contended that this action founded merely in damages, and therefore that there was no debt until it were *ascertained by judgment*, that it could not be proved under the commission; and if so, could not be discharged by the certificate.

Law, for the rule, cited the case of *Graham v. Benton*, 1 *Willson* 41. where it is holden that a bankrupt getting his certificate after judgment, shall be discharged on motion; and contended that in this case the debt became *ascertained by the verdict*. He also cited *Blandford and Fox, Comp.* 138. to shew that if the cause of action arises before bankruptcy, interest and costs accrued after are likewise discharged by stat. 12 Geo. 3. c. 47. s. 2; and he also contended that the costs followed the verdict.

Balgu replied, that the cases cited were founded on actions brought for an existing debt, at the time of bringing the action; which was not the case here, for even at the time of the bankruptcy there was nothing but a mere right to recover damages.

WILLIS, J. There is no distinction between a tort and a contract, where a judgment follows the verdict.

Rule absolute (a).

(a) See *Cook's Bank, Law*, p. 153. [See also *Aylett v. Harford & al.* 2 *Black. Rep.* 1317. and *Gulliver v. Drinkwater*, 2 *Term Rep. B. R.* 261.]

ROX on the Demise of PERRY, against JONES and Others.

A possibility
coupled with
an interest is
divisible.

THIS was an ejectment to recover a house and garden, &c. at *Ivelchefter*, tried at the Summer assizes 1787, at *Bridge-water*, in which a special verdict was found as follows:

“ *John Lockyer* being seized in fee of the premises in question, on the 13th of June 1734 made his will, and after charging all his lands and hereditaments with the payment of certain annuities, devised in the following manner:

“ And my said lands and hereditaments, thus charged as
“ afore said, I give unto my brother *Thomas Lockyer*, until his son
“ *John*, or any other of his younger sons, shall attain the age of
“ twenty-one years, which shall first happen; and in case he shall
“ have no younger son that shall live to attain the said age, but
“ shall have only one son that shall live to attain the said age,
“ then until such only son shall attain the said age, in trust that
“ the clear rents, issues, and profits of the premises, after all
“ charges and reparations deducted (except my now dwelling-
“ house at *Ivelchefter*, and the garden and orchard thereto be-
“ longing, which I will shall be enjoyed by him for his own
“ use during the time above-mentioned), be preserved and im-
“ proved; and the same, with the produce thereof, I will shall
“ be laid out and employed in manner as is herein-after directed
“ with

“with regard to the overplus of my personal estate. And when 1788.
 “and as soon as my said nephew John Lockyer, or any other of the
 “younger sons of my said brother Thomas Lockyer, born or to be ROE
 “born, shall attain the age of twenty-one years, then I give my on d. mise of
 “said dwelling-house, orchard, and garden, and all other my said PERRY,
 “lands and hereditaments, thus charged as aforesaid, unto my said against
 “nephew John Lockyer, or unto such other son as for the time being JONES
 “shall be a younger son of my said brother Thomas Lockyer and and others.
 “shall first attain his said age of twenty-one years, and to the
 “heirs and assigns of such younger son for ever. But if my
 “said brother Thomas Lockyer shall have but one son that shall live to
 “attain the said age, then I give the same unto such only son, his heirs
 “and assigns for ever.”

The testator died on the 23d of October 1734, leaving the said Thomas Lockyer his brother his heir at law, and Joseph Tolson Lockyer and John Lockyer, the two sons of Thomas Lockyer, living at the time of his decease, and who were the only issue of the said Thomas Lockyer. John Lockyer, the nephew, died on the 6th of June 1751, under twenty-one years of age. Joseph Tolson Lockyer married Maria Perry, the lessor of the plaintiff, on the 20th of February 1752, and on the 26th of September 1789 made his will in the following words: “All
 “such wordly estate, of what nature or kind soever, whether
 “in possession, remainder, or reversion, that I shall die seized or
 “possessed of, interested in, or entitled to, invested in, or shall be-
 “long to me at my decease, wheresoever or howsoever, in any
 “manner or wise, I do give, devise, and bequeath, and every
 “part and parcel thereof, fully, wholly, and absolutely, unto
 “my wife Maria Lockyer, to be by her, her executors, admi-
 “nistrators, and assigns, peaceably and quietly held, occupied,
 “and enjoyed for ever, free from the claims or demand of any
 “other person or persons whatever out of, from, or to the same,
 “or any part thereof.”

Joseph Tolson Lockyer died in March 1765. Thomas Lockyer, the father of Joseph Tolson Lockyer, entered into possession of the premises on the death of John Lockyer, the original testator, and continued in possession till his death in 1785, when the defendants obtained possession.

This cause was argued in Michaelmas term 1787, by Lawrence, Serjt. for the lessor of the plaintiff, and Bond, Serjt. for the defendants; and in Easter term last by Le Blanc, Serjt. for

1788. for the lessor of the plaintiff, and *Rooke*, Serjt. for the defendants.

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on demise of
PERRY,
against
JONES
and others.

On behalf of the lessor of the plaintiff it was contended, that this was a vested interest in *Joseph Tolson Lockyer*, though it was subject to be divested by the birth of another son of *Thomas Lockyer*. *Boraston's case*, 3 Rep. 19. *Taylor v. Biddal*, 2 Mod. 289. *Edwards v. Hammond*, 3 Lev. 132. *Stocker v. Edwards*, 2 Shower 398. *Gibson v. Lord Montfort*, 1 Vesey 485. *Goodright*, on the demise of *Larmer v. Searle et Ux.* 2 Wilf. 29. *Pelham v. Gregory*, 5 Brown's Cas. in Parl. 435. If it were a vested interest, it was clearly devisable.

But supposing it to be only a possibility, it is in that case also devisable. A possibility is transmissible. It may be assigned by commissioners of a bankrupt. 3 P. Wms. 132. A fine will pass it. 3 P. Wms. 372. *Vick v. Edwards*. *Pollexfen* 54. *Weale v. Lower*. It is also descendible. 2 Ventr. 347. 1 P. Wms. 566.

If then it be transmissible, assignable, and may descend, there can be no reason why it should not also be devised. The statute of wills (a) has the word "hereditaments;" but whatever is transmitted from the ancestor to the heir is an hereditament, as the heir does not take by purchase, but by descent. That a possibility is in truth devisable, is determined by the case of *Selwin v. Selwin*, 1 Black. 222. and *Roe* on demise of *Noden v. Griffith*, ib. 605. which rule *Blackstone* has adopted in his *Commentaries* (b).

For the defendants it was argued.

1. That this was not a vested interest in *Joseph Tolson Lockyer*, (since during the life of the father another younger son might be born) but was only a possibility. That if it were vested, yet the ejectment was barred by the statute of limitations; for after *Joseph* had attained the age of twenty-one, the interest of the father in the mansion-house ceased, and his possession was from that time adverse; but that possession continued above twenty years.

2. That being a possibility, it was not devisable. Descendible and devisable are not convertible terms. A right of entry may descend, but cannot be devised. A possibility at common law was not assignable. *Shep. Touchst.* 238. 414. *Moore* 806.

(a) 27 H. 8. c. 10. s. 11.

(b) Vol. 2. p. 290.

Popbam 5. And is only assignable on a bankruptcy, by virtue of the statute (a), which says, "whatever the bankrupt may depart withal;" but as he may release a possibility, he may depart with it. A fine levied of it operates only by estoppel against the cognitor. The possibility of a term may be devised, it being holden, that as the remainder of a term must go to the executor, he takes it as a trustee for the devisee. *Wind v. Jekyl*, 1 *P. Wms.* 572. But in that very case it is expressly said by the Chancellor, that a man cannot devise a fee simple, which he has not at the time of making the will. In pleading a devise, it is stated that the testator was seised, but he cannot be seised of a mere possibility. The statute of wills puts a devise on the same footing with a conveyance, but a mere possibility cannot be the subject of a grant. A contingent freehold interest was never considered in the law as being devisable, till it was so considered by Lord *Mansfield* in *Selwin v. Selwin*. But the decision of the Court in that case was founded on the bargain and sale and recovery, being all one conveyance. *Wright v. Wright*, 1 *Vezey* 409. *Fitzgibbon* 236. *Bunter v. Coke*, 1 *Salk.* 237. *Bishop v. Fountain*, 3 *Lev.* 427. *Pheasant v. Pheasant*, 2 *Ventr.* 340. 1 *Roll. Abr.* 609.

3. Supposing this to have been a devisable interest, it did not pass by the will of *Joseph Tolson Lockyer*, not being specifically named.

Cur. vult advis.

In this term the following judgment of the Court was delivered by

LORD LOUGHBOROUGH—Three questions have been made in this case. 1. Whether there was a vested interest in *Joseph Tolson Lockyer*? 2. Whether, if it were contingent, it was devisable? 3. Whether it passed by the will of *Joseph Tolson Lockyer*?

The discussion of the first question is unnecessary; for taking it to be a springing contingent executory use in *Joseph*, we are all of opinion that it was devisable, and passed by his will.

The case of *Selwin v. Selwin* has determined this point; and we think ourselves bound by that determination, confirmed as it is by the case of *Moor et Ux. v. Hawkins*, in Chancery, before Lord *Northington*, in the year 1765, which was this:

(a) 13 *Eliz. c. 7.*

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" *James Grubb* devised all his real estates, in trust for his son *James*, and if he should die without issue under age, then, that all his estates should go to *Cochran*, his heirs and assigns." *Cochran* devised "all the estates whereof he was seised in possession, remainder or reversion to the plaintiff, and died in the life-time of *James Grubb* the son, who afterwards died under "twenty-one and without issue."

On a bill brought by the devisee of *Cochran*, a question was made, Whether the possibility given to *Cochran* was devisable? Lord Chancellor said, "I have never had any doubt, since I was "twenty-five years old, but that these contingent interests were "devisable, notwithstanding some old authorities to the contrary, "I sent the question however into the King's Bench in the case "of *Selwin v. Selwin* for the satisfaction of the parties, and the "certificate of the judges in that case implies, I think, that they "agreed with me in this opinion. Upon which the Solicitor "General *De Grey* and Mr. *Skinner* waived all further argu- "ment on the other side, and Lord *Northington* added, this argu- "ment is properly withdrawn, as the point is settled and ought "not to be shaken. It is a liberal and right determination."

On these authorities therefore we give

Judgment for the lessor of the plaintiff (a).

Rooke then moved to stay the possea, till the event of a writ of error which the defendants meant to bring, should be known. This was granted on condition that they should undertake to account for the mesne profits from the day of the demise.

(a) [This judgment was affirmed by the | See 3 Term Rep. R. R. 88—98.]
court of B. R. in Hilary term, 1789.—]

NOBLE against KING and SMITH.

In an action
against exe-
cutors in
their own
right, on a
covenant for
good title and
quiet enjoy-
ment against
any person or
persons what-
ever, con-
tained in an
assignment of a lease of the testator by way of mortgage, the declaration must shew a breach by some
one of the covenants; [as that the executor's title commenced prior to the assignment made by them.]

THIS was an action of covenant brought against the defendants in their own right, (who were executors of one *Joseph King*,) for a breach of the following covenant contained in the assignment, by way of mortgage of a lease belonging to the testator:

"And further, that for and notwithstanding any act, deed, matter or thing whatsoever, had, made, or done, by the said *Mary King* and *Samuel Smith*, or either of them, the said

assignment of a lease of the testator by way of mortgage, the declaration must shew a breach by some one of the covenants; [as that the executor's title commenced prior to the assignment made by them.]

"therein-

“ therein-before recited and assigned indenture of lease is a good
 “ and sufficient lease, valid in law, and the term of years thereby
 “ created is not forfeited, surrendered, or otherwise determined,
 “ or become void or voidable. And also, that they the said *Mary*
 “ *King* and *Samuel Smith*, have not nor hath either of them, at
 “ any time or times, since the decease of the said *Joseph King*
 “ made, done, or committed, or wittingly or willingly suffered
 “ any act, matter, or thing, whereby, or by reason or means
 “ whereof the said piece or parcel of ground, and the messuage
 “ or tenements, shop and premises, or the term of years thereof
 “ granted as aforesaid, are, or is, or shall or can be in any wise
 “ incumbered or charged in title, charge, or otherwise how-
 “ soever. And that for and notwithstanding any such act,
 “ they, the said *Mary King* and *Samuel Smith*, or one of them,
 “ now have in themselves, herself, and himself, good right,
 “ full power and lawful and absolute title and authority to bar-
 “ gain, sell, and assign the said piece or parcel of ground, and
 “ the messuages or tenements, shop and premises thereon erect-
 “ ed, with their and every of their appurtenances, unto the said
 “ *John Noble*, his executors, administrators, and assigns, in man-
 “ ner and form aforesaid: and also that it shall and may be
 “ lawful to and for the said *John Noble*, his executors, admini-
 “ strators, and assigns, from time to time, and at all times from
 “ and after breach or default shall happen to be made in pay-
 “ ment of the said sum of, £c. and lawful interest for the same,
 “ peaceably and quietly to enter into the said demised premises,
 “ £c. and to take the rents and profits, £c. (in the usual way)
 “ without the lawful suit, let, trouble or denial of or from the
 “ said *Mary King* and *Samuel Smith*, or either of them, their,
 “ or either of their, executors, administrators, or assigns, or any
 “ other person or persons whomsoever.”

The breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment, obtained by one *John Yates*, having *lawful title to the premises*.

To this declaration the defendant specially demurred. The causes of demurrer were; “ That it does not appear by the
 “ said declaration, that the said *John Yates* therein mentioned,
 “ at the time of the supposed eviction and expulsion therein also
 “ mentioned, or at any time before or since, had any lawful
 “ title to the said premises by, from, or under the said *Mary*, and
 “ *Samuel*, or either of them, or by reason or means of any act,

D 2

“ matter,

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1788. " matter, or thing made or committed, or wittingly or willingly
 " ly suffered by them the said *Mary* and *Samuel*, or either of
 " them, &c."

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 against
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Joinder in demurrer.

This was argued in *Easter* term by *Runnington*, Serjt. in support of the demurrer, who contended, 1st. That executors can only be understood to covenant against their own acts: the words therefore, " any other person or persons whomsoever must be restrained to persons claiming under them (a)."

2d. That it does not appear that *Vates's* title commenced by any act of the defendants, or prior to the assignment made by them to the plaintiff, who might therefore have been evicted by means of some act done by himself since the assignment.

Le Blanc, Serjt. *contra*. This is an express covenant for quiet enjoyment, and was intended to go farther than the usual covenants by executors. The words cannot be restrained, for the prior covenants against their own acts were sufficient to protect the plaintiff to that extent. This therefore is an additional covenant. In the case of *Woodroffe v. Greenwood*, *Cro. Eliz.* 517. a covenant of this kind was taken against the covenantor; and in *Mountford v. Catesby*, *Dyer* 328. the same doctrine is laid down, though that was *assumpsit* for quiet enjoyment, &c. against all persons, &c. It was there holden that the undertaking extended to a trespasser, and though in *Vaughan* 123. that part of the case is denied, and it is said that the warranty only related to one having legal title, still that case applies to the present.

As to the second objection, it was not material to state in the declaration, that *Vates's* title was paramount to that of the plaintiff—the defendants ought to have pleaded it; after verdict, this objection would not prevail, and is not now a cause of demurrer.

Cur. vult adv.

In this term, on the second point made by *Runnington*, the Court gave

Judgment for the defendants.

Adair, Serjt. then moved to amend the declaration, which the Court refused, on the ground that they would not interfere to assist the plaintiff in an action brought against executors in

(a) *Shep. Touchst.* c. 7 p. 163. *fol. edit.* 1 *Burr.* 287. 3 *Burr.* 1640. *Allyn*, 27. *Allyn*, 41. *Term Rep. B. R.* vol. 3. 310. 672.

their

their own right, who appeared only to have acted in the disposition of the testator's effects.

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Noble
against
King and
Smith.

JOHN COOPE, JOSEPH COOPE, WILLIAM JESSER COOPE, CHARLESSON, PIERCY the Elder, PIERCY the Younger, PRITZLER, and BROWN; *against* EYRE, ATKINSON, WALTON, HATTERSLEY, STEPHENS, and PUGH.

THIS was an action brought by the owners of a *Greenland* ship called *The Earl of Chatham*, against the defendants, on an agreement to purchase oil, the cargo of the ship.

The declaration stated, that on the 29th of *August* 1786, the plaintiffs sold the cargo to the defendants, at the rate of 20*l.* per ton, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by defendants *Eyre, Atkinson, and Walton*. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre and Co.* "that the plaintiffs should keep the oil "in their possession till the 1st of *January* following; and if "the defendants did not pay for it on or before that day, the "plaintiffs were to be at liberty to authorise the broker to re-sell it at the best price he could get; and if, upon such re-sale, "the oil should not produce 20*l.* per ton with all charges, &c. "the plaintiffs were to deduct the difference of the price out of "the bills placed in their hands as a collateral security." That the defendants neither paid for nor took away the oil; whereupon the plaintiffs authorised the broker to re-sell it. That the deficiencies upon the re-sale amounted to 400*l.* besides brokerage, &c. 100*l.* That the bill of exchange accepted by the defendants was presented to them for payment and refused.

Second count. Sale to defendants; their refusal to pay or take the oil. Re-sale at a loss of 400*l.* and expences 100*l.* There were also the common counts—damages 3000*l.*

(7) [In order to constitute a partnership, a communion of profit and loss between the parties is essential; and this is the true criterion to judge by. See p. 43. 48. and *Servile v. Robinson & al.* 4 Term Rep. B. R. 720. See also *Waugh v. Carver & al.*; *post*, vol 2. p. 235—247. that where one takes a moiety of the profits indefinitely, he shall by operation of law be made liable to losses.]

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Plea, general issue, by all the defendants except *Eyre*, who suffered judgment by default, with notice that damages would be assessed against him according to the event of the cause. Before the action was brought *Eyre* and Co. had become bankrupts.

This was tried at the sittings after last *Hilary* term, before Lord *Loughborough* by a special jury, when it appeared, that on the 24th of *August*, the defendants, *Eyre* for himself and partners, (who were *Atkinson* and *Walton*, general merchants,) *Hatterfley* for himself and *Stephens*, who were oil merchants, and *Pugh* for himself and son (a), who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. That *Eyre* should be the ostensible buyer, and the others *share in his purchase at the same price which he might give*. *Hatterfley* and Co. were to have one fourth, *Pugh* one fourth, and *Eyre* and Co. the remaining moiety. That they bought large quantities of oil belonging to other ships, and other traders besides the plaintiffs, in the name of *Eyre and Co.* That *Hatterfley* and *Pugh* occasionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction, and also made many declarations, "that they were all jointly interested in the different purchases, and that there was a general concern between them" (b).

On

(a) The son died before the action was brought.

(b) The evidence as to this point was in substance as follows:

Garforth, the broker, proved the contract, signed by *Eyre* for himself and Co.—General orders from *Eyre only*, to purchase any quantity of oil which might offer—*Hatterfley* and *Pugh* told him they were to have a part of what was purchased in the firm of *Eyre* and Co. and that they were jointly concerned. They went to receive a cargo sold by *Tbwaite* at *Blackwall*. *Tbwaite*, who had also sold oil to the Defendants, proved that *Hatterfley* said, "It is all the same whether *Eyre* or I buy it—it is the same concern;" and that *Pugh* said, "*Hatterfley* and I am concerned;" and that they attended to see the oil gaged. *Strickland*, who had the care of *Greenland Dock*, proved that *Hatterfley* and *Pugh* said, "We have purchased your oil." That on failure of *Eyre* and Co. *Pugh* sent an order not to deliver the oil of the ship *Britannia*, which had been purchased by *Eyre* and Co. and had the cellars locked.

Kilbington sold oil to *Eyre* and Co. by *Garforth* the broker, delivered to *Hatterfley*, who gave in payment a bill accepted by *Eyre* and Co. and his own note to indemnify the witness in making an indorsement.

Captain *Hastings* sold oil to *Eyre* and Co. by the same broker, for which *Pugh* signed an agreement.

Captain *Dowson* also sold oil by *Garforth* to *Eyre* and Co. for which *Pugh* gave a receipt; and being asked whether the buyers were responsible persons, told the witness that he was *satisfied*, saying, "I am concerned, *Hatterfley* is concerned, and there is a house or

" *Norwich*."

On the part of the defendants, it was insisted on at the trial, that the contract of sale was made between the plaintiffs and *Eyre and Co. only*, and that the agreement which the defendants entered into between themselves, was only a sub-contract, and did not constitute a partnership. Lord *Loughborough*, after declaring his opinion, (that as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the *profit and loss* as the law made necessary to a partnership,) directed a verdict to be found for them, which was accordingly done.

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Marshall, Serjt. having obtained a rule to shew cause why a new trial should not be granted on the mis-direction of the judge; in *Easter* term,

Band and *Le Blanc*, Serjts. shewed cause. The only question is, Whether the three houses jointly contracted with the owners of the ship, so as to make them partners? This could not be, since, in order to make men partners, they must either pledge their *joint* credit, or be *equally* interested. Now the credit was here given to *Eyre and Co. alone*, and the shares of the purchase were *unequally* divided. Whether it be a secret or avowed partnership, the principle is the same; the parties must be possessed like joint-tenants *per my et per tout*; each must be interested in the whole, and have a right of survivorship. But if *Eyre* and his partners had died, *Hattersey* and *Pugh* could have had no claim to their shares of the purchase, which would have vested in their executors. The plaintiffs only contracted with *Eyre and Co.*, there was no privity between them and the other defendants.

If a lessee makes an under-lease, the landlord cannot sue the sub-lessee for his rent. If a man should buy a set of horses and sell a pair of them, the buyer of the pair would not be liable for the whole set, in default of the original purchaser.

In *Hoare v. Dawes* (a), and *Grace v. Smith* (b), it is established as essential to a partnership, either that there should be a contract to share profit and loss, or that the parties should offer

"*Norwich which can buy us all.*" *Pugh* afterwards repeated this in the presence of *Hattersey*, who acknowledged it to be true.

Pbals proved that he was agent to sell oil for a Mr. *Tomans*, and not trusting to *Eyre* only, whom he considered as a mere speculator, required the names of the others concerned to be given in, upon which *Garsuth* the broker gave in the names of *Hattersey* and *Co.*

(a) *Dougl* 371.(b) 2 *Black*. 958.

1788. their joint credit to the vendor. In *Hoare v. Dawes* the ostensible agent was alone liable. There a number of persons employed a broker to procure others to join in the purchase of tea; but there is no material difference, whether a broker be jointly employed to make a purchase, or separately, to find joint-purchasers.

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The agreement between the defendants can only be considered as a sub-contract, and not of such a nature as to constitute a partnership.

Adair, Marshall, and Runnington, Serjts. in support of the rule admitted that a participation of profit and loss was necessary to constitute a partnership, and argued that this was a contract of that nature. Whether the agreement be, to divide the goods themselves at a given time, or the produce on the sale of them; each party runs the same risk, and each has his share of profit and loss, either in the increased or decreased value of the goods, or the increased or decreased price for which they might actually be sold.

The defendants *Hattersley* and *Pugh* occasionally permitted their names and credit to be used, and holden out as persons jointly concerned: neither of them could say "*Non hæc in fœdera veni.*" While the speculation promised well, and they feared that the whole profit would belong to the assignees of *Eyre* and Co. they went to *Greenland Dock*, to secure to themselves their respective shares of the concern; this was holding themselves out as jointly concerned in some of the contracts; but if they were concerned in some, they were so in all, as they were all made under the same order. It was known that *Eyre* had several other persons concerned with him, otherwise he could not have gained credit to so large an amount; but it was not necessary that the vendors should know who the private partners were; they gave credit to them though not by name. The broker would not have made a bargain which could not be fulfilled; he knew that he was acting for responsible persons. But it shall not be in their power after three months have elapsed, by their own act to convert a partnership into a mere agreement. In the case of *Rich v. Coe* (a), the owners of a ship let for a term of years to the master, who covenanted to repair her at his sole expence, were held liable for repairs, though the ship-builder supposed the master to be the owner, and gave credit only to him.—The firm of a house may have a different

(a) *Cowp.* 636.

meaning

meaning according to the nature of the trade. *Eyre* and Co. as general merchants might mean *Eyre*, *Atkinson*, and *Walton*, but in the oil trade (which was known to be an extraordinary concern); *Eyre* and Co. meant *Eyre* and the other defendants, because they were all concerned together in the oil contracts. It is objected that this is not a partnership but only a *sub-sale* or *sub-contract*. A *sub-contract* is a secondary contract depending upon some primary and antecedent one. In the case of a purchase of goods, it means a *subsequent agreement*, to take a part of what has been *previously bought*, it is like an *under-lease* of lands. But a previous agreement to share in an intended purchase, is a contract of *partnership*. So if, before a lease was granted, the intended lessee were to agree to let another have a *share in the concern*, that could not be regarded as a sub-contract, the person sharing would, in such case, be deemed a co-lessee in equity, and would be liable to the rents and covenants; for *qui sentit commodum sentire debet et onus*.—It could not be a sub-sale to *Hatterfley* and *Pugh*, because each was to have a share on the same terms as *Eyre* and Co. purchased. But *Eyre* and Co. were merchants, and merchants never buy to sell again at *prime cost*. *Hatterfley* and *Pugh* must therefore be said to have *shared originally* in these bargains, and not to have purchased any second part of them. The spirit of buying and selling is gain, the spirit of partnership is mutual participation of gain.

It is also objected, that the relation of partners does not exist where *one* cannot bind the *whole*, and here no one could sell all that was bought.

This rule is right, but does not apply. The broker did not buy a specific lot for each, but one purchase for all. Till they divided it, therefore, each was entitled to it *per my & per tout*, for each had an undivided share. As *Eyre* could authorise the broker to *buy* the whole, so could he authorise him to *sell* it. Suppose that *Eyre* had actually sold it, neither *Hatterfley* nor *Pugh* could have maintained trover against the vendee for their shares; because any joint owner of a mere personal thing, may sell it, and the vendee will have a good title; the co-proprietors can only call upon the vendor for their shares of the purchase money. If *Eyre*, before division, had sold the whole at a great profit, *Hatterfley* and *Pugh*, though they had never advanced any money, would have been intitled to their *share of the profits*,

1788. *sits*, which proves that they could not claim as sub-purchasers.

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If *Hatterfley* and *Pugh* had advanced to *Eyre*, their respective shares of the purchase-money, and *Eyre*, instead of dividing the oil, had immediately sold it and divided 15 of 20 *per cent.* profit, in that case either *Hatterfley* and *Pugh* must have received *usurious interest*, or they must have been partners. If the plaintiffs had refused to deliver the oil, and *Eyre* and Co., having tendered the money, had brought an action against them for the non-delivery, if the previous agreement with *Hatterfley* and *Pugh* had come out at the trial, *Eyre* and Co. would have been non-suited, for not joining with *Hatterfley* and *Pugh* as plaintiffs. But if *Eyre* and Co. had been permitted to recover in such an action the amount of the *improved value* of the oil, he must have accounted to *Hatterfley* and *Pugh* for their respective shares of the profits.

But if *Eyre* and Co. could not sell, they could make no title to the vendee, and then *Hatterfley* and *Pugh* might bring trover against the vendee for their shares. But their shares being undivided, the vendee might have pleaded in abatement, that *Eyre* and Co. ought to have been joined as plaintiffs, and if they had been joined, the vendee might have shewn a sale from some one of the joint-plaintiffs and non-suited them. From hence it follows, that all the defendants had a joint property in the goods till division, that any one of them therefore in *possession* might sell, and *bind all the others*, and consequently that they were *partners*.

Cur. vult advis.

In this term the judges delivered their opinions as follow:—

GOULD, J.—The facts of the present case are shortly these. The defendants, *Eyre* and Co. order one *Garforth*, a broker, to buy quantities of oil.—The defendants, *Hatterfley* and Co. and *Pugh* and Co., were to have for their respective shares, each one-fourth.—The broker buys divers ship loads; and to some of the vendors, the defendants, during the treaty, declare it to be a common concern between them and *Eyre* and Co., in whose name the purchases were made.

But, with respect to the plaintiffs, the purchase was made singly in the name of *Eyre* and Co., without any notification that the defendants had any concern in it.

These purchases were made on speculation, there being a prospect that oil would rise in price; but it afterwards fell, and then the

the defendants contend that they are not liable to make good the difference, *Eyre* and Co. having failed. 1788.

Upon these facts, two questions arise; 1st, Whether the defendants are partners with *Eyre* and Co.? 2d, If not, Whether they are to be deemed joint-contractors in the purchase for *Eyre* and Co. and so liable for the whole? COOPER and others against EYRE and others.

As to the first, I think they cannot be considered as partners with *Eyre* and Co. in this purchase from the plaintiffs. Although there may be partnerships in many other instances besides what are merely commercial, as in the case of farms rented by several persons jointly, and of partnerships of attornies, and the like, yet I think the true criterion is as stated by Mr. J. *Blackstone*, in the case of *Grace* and *Smith*, "Whether they are concerned in profit and loss;" and the same doctrine is, in effect, held by Chief Justice *De Grey*, in that case.

This is strongly illustrated by *Bloxam* and *Fourdrinier v. Pell* and *Brooke* in *B. R.*, which was cited in *Grace v. Smith*. It there was agreed, that whether the sum of money was a fresh loan, or left in the hands of the man who was originally concerned in the trade in partnership with the person advancing or leaving the money, made no difference.

In both cases the money was left. In *Bloxam's* case he was to have (besides interest) 200*l. per annum*, as and in lieu of his share of the profits, and to have the inspection of the books.

This was properly held to continue his connection as a partner, and excluded him from being at liberty to set himself up as an usurer.

In the case of *Grace* and *Smith*, *Smith* stipulated to have, besides interest, an annuity of 300*l. per annum*, but not a word to refer it to the trade.—And therefore, as the jury found that the defendant was no partner, a new trial was refused; and *Blackstone* lays it down, that the supposition of its being usury, had no influence on the question.

In both instances the annuities were limited to seven years.

It was held in both the cases, that the inequality of the concern, as to profit and loss, was immaterial to those who dealt with them, however it might be a regulation between themselves.

But, in the present case, there was no communication between the buyers as to profit or loss. Each party was to have a distinct share of the whole; the one to have no interference with the
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1788. the share of the other, but each to manage his share as he judged best. The profit or loss of the one might be more or less than that of the other.

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In this light I am of opinion there is no foundation for the Court to adjudge the present case a partnership; and, the jury having found for the defendants, that there is no reason to disturb the verdict.

2d. Whether they can be considered as joint-purchasers?

I think it would be attended with great inconvenience in the common dealings between man and man, to admit that position.—The stipulation is, that the purchase should be made as for *Eyre* and Co. in the total, and each is to have a separate and distinct part.—A man goes into *Yorkshire* to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two. It surely cannot be contended, that this could make the friend a joint-contractor to subject him in failure of the other, to pay for the whole bargain.

So in a familiar case, a man is about to buy a ton of wine and agrees that a friend shall have a hoghead.

And I think the case of *Hoare* and *Dawes* is strong on this head; I need not state the case, it having been already stated several times.

Lord *Mansfield* holds it merely “an undertaking with the broker by each for a particular quantity, no undertaking by one to advance money for the other, nor to share with one another in profit or loss.”

“It would be most dangerous if the credit of a person who engages for a 40th part (for instance) should be considered as bound for the 39 others.”

This doctrine falls in exactly with my ideas. I think cases of this nature should stand on broad lines—not on subtleties and refinements the source of litigation and disputes.

HEATH, J.—The question for the determination of the Court is, Whether the contract made with the plaintiffs is so far binding on the defendants *Pugh*, *Hattersley*, and *Stephens*, as to make them liable on the failure of *Eyre* and Co.

If this contract may be considered independently of the other contracts given in evidence, there could be little doubt.—*Eyre* and Co. employ *Garforth*, their broker, to buy oil, and it is agreed that the other defendants shall have aliquot parts when the commodity is purchased.

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This is a sub-contract,—by a sub-contract I mean a contract subordinate to another contract made or intended to be made between the contracting parties on one part, or some of them and a stranger.—*Eyre* and Co. are the only purchasers known to the plaintiffs; entire credit was given to them alone. *Pugh*, *Hattersley*, and *Stephens*, can be liable only in the event of a concealed partnership, on this principle, “that the act of one partner binds all his co-partners, on account of the communion of profit and loss”—In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it.

Great reliance has been placed on this being a joint concern, and a joint speculation. It is so between the defendants, but the contracts made with the other vendors are different.—A contract made between *A.* and *B.* cannot be given in evidence to explain a contract made between *A.* & *C.*—It is *Res inter alios acta*. In fact the defendants have pledged themselves explicitly with other persons in a different manner. The contracts made with the other merchants are not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely, that the house of *Eyre* and Co., as a failing house, was to stand forwards in order to protect the other defendants, who by such means might have the benefit of the speculation, if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence has been adduced; on the contrary, it appears that the objection made by the other vendors to the firm of *Eyre* and Co. was, “that they were unknown and new in the trade.”

If *Pugh*, *Hattersley*, and *Stephens*, had authorised the broker to purchase aliquot shares for them, this case would have resembled that of *Hoare v. Dawes*, the doctrine of which is confirmed by a passage in the Digest, lib. 17. tit. 2. *pro socio*, § 33. “*qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longè remotum est.*”

No detriment, from this decision, can arise to trade, or affect the credit of merchants; for it behoves every contracting party to consider the responsibility of the persons with whom he contracts, and he has also the resource of a dormant partnership, if any such exist and can be proved.—For these reasons I am of opinion that the rule ought to be discharged.

WILSON, J.—I am so unfortunate as to differ in opinion from the rest of the Court on the present question.

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The contract was actually made between the plaintiffs and Eyre and Co., but if the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted. That they were so concerned, sufficiently appears from the contracts with the other merchants, and their own declarations; these I think were proper to be given in evidence, being against themselves, to which evidence the verdict was contrary.

The defendants were all concerned in a general speculation. There was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was, there is no evidence precisely to prove, no witnesses having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? Surely from the declarations of the parties themselves.

Thwaites' evidence proves that *Hattersley* said "It is all the same whether Eyre or I buy it, it is the same concern." This shews it was not a sub-contract. If *Hattersley* had bought the oil himself, he would have been a contractor with *Thwaites*; and when he who knew what the agreement was between the defendants, declares it to be the same thing whether he or Eyre bought it, he puts himself expressly in the place of an original contractor; the Court then cannot say, that he was a sub-contractor. This declaration was before the purchase of the cargo of the *Earl of Chatham*, on which the action is brought.

Kilbington, the keeper of *Greenland Dock*, proved that *Hattersley* and *Pugh* both said to him "we have purchased your oil." This was a direct avowal of their having jointly contracted, which was not done with a view to strengthen the credit of Eyre and Co. being after the purchase was made.

When Captain *Dowson* expressed some doubts, whether Eyre and Co., to whom he had also sold his oil, were able to pay him, *Pugh*, who received it, told him "you are safe," and declared that "he was concerned, and *Hattersley* was concerned, and a house at *Norwich* who could buy them all." Now, if they were sub-contractors, this declaration was not true, how could their sub-contract make the vendor safe? Here then is clearly a direct acknowledgement of their being original contractors.—The evidence also of the broker shews that they all originally contracted; he delivered accounts to them, and informed

Hattersley

Hattersley and *Pugh* how matters went on. In one instance he was so conscious of their being jointly concerned, that he gave in their names as such to the agent of *Yeomans*, who would not otherwise have given credit to the name of *Eyre* and Co.

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Upon failure of *Eyre* and Co. *Hattersley* and *Pugh* gave orders to the keeper of the dock, not to give up the oil remaining in the dock, in the name of *Eyre* and Co., and took it as their own. Now they could have had no right to do this, if they had been only sub-contractors. Admitting that after goods are delivered there cannot be such a participation of profit and loss as will make a partnership, unless the parties originally contracted, yet their dividing the goods, and each taking his share, after delivery, will be good evidence of an original contract. Whether the contract were joint or separate, nothing done subsequent can alter the nature of it, but there may be subsequent evidence to prove of what nature it was.

(a) In *Grace v. Smith* the terms of the contract were stated; if the terms of this contract had been stated, we might have judged of the responsibility of the defendants, but not being stated, we must receive their own acknowledgements of responsibility.

In (b) *Hoare v. Davies*, the question was not between the buyer and seller; the *East India Company* were the sellers, and the money must have been paid before the delivery of the goods. In that case there was no agreement between the defendants, but here the declaration of the parties themselves are strong evidence of an original joint-contract. They who best knew what their contract was, have declared it to be joint, and we cannot say it was separate. Being acknowledged to be joint in many instances, we must take it to be so in all.

(c) *Clavering v. Wesley* does not apply to the present case, being on the covenants of a lease, which only bound the parties to them. Here all the defendants were interested in the subject matter.

It has been said, that as the credit was given to *Eyre* and Co. only, the vendors could not be injured, if *Eyre* and Co. only were liable. But this argument goes to prove that no dormant partner would be answerable for the acts of the ostensible agent.

I am therefore of opinion that a new trial ought to be granted.

(a) 1 Black. 998.

(b) Dougl. 371.

(c) 3 P. Wms. 402.

Lord

1788. Lord LOUGHBOROUGH—The first impression on my mind was against the defendants, but in the course of the trial my opinion changed, and I thought they were not liable as partners; I still continue to think so, and consequently, that the verdict was proper.

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This being an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has been justly observed, that a secret partnership can be no consideration to the vendor; though for reasons of policy and general expedience the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of *Europe*, limited partnerships are admitted, provided they be entered on a register; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership a communion of profits and loss is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. The late case of the cotton purchase resembled the present, so far as the several parties were each to take aliquot shares, but there, no part of the commodity was to be re-sold, without the consent of *all* concerned. Here, *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question, there was not that communion between them necessary to make them partners; their agreement was a sub-contract, which as my brother *Heath* observed, may be executory; it was to share in a purchase to be made. The seller looked to no other security but *Eyre* and Co.; to them the credit was given, and they only were liable.

Rule discharged.

FULLER *against* PRENTICE.

ADAIR, Serj. moved for an attachment against the defendant, who lived at *Brandon* in *Suffolk*, for not appearing in obedience to a *subpœna*, to give evidence in a cause tried before Lord *Loughborough*, at the Sittings after last *Easter* Term, at *Westminster*, on the following affidavit, namely, "That she was personally served with the *subpœna* ticket, and that the original was shewn to her—That 2*s.* and 6*d.* were given her, and a promise made her to bear all her expences—That a place was taken for her in the stage coach, from *Brandon* to *London*. That she accordingly undertook to go in the coach at the time appointed. But when the coach was ready to take her up, and more money also ready to be given her, by the deponent, she confined herself within her house and refused to go."

The court will not grant an attachment against a witness for not obeying a *subpœna* to attend at a trial, unless the whole expences of the journey, and of the necessary stay at the place of trial, be tendered at the time of serving the *subpœna*.

But the Court refused the attachment, saying that it might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the re-payment of their necessary expences; the whole of which, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them, at the time of serving the *subpœna*, otherwise an attachment would not lie.

RASTALL *against* STRATON.

DEBT—The declaration stated, that in *Trinity* term 1787 the plaintiff recovered by a judgment in *B. R.* 42*l.* 1*s.*, for his costs in the defence of an action brought by the defendant against him the said plaintiff in that court.—

Plea—*Nul tiel record*.—

The record being brought by *mittimus* from the court of *B. R.*, *Runnington*, Serj. moved that it might be read, which being done, it appeared that the judgment on which the plaintiff declared, was recovered in *Easter* term 1788, instead of *Trinity* term 1787; this he urged was a failure of record.—It also appeared, if the declaration states the judgment against one defendant only, when it was against more than one.

In an action on a judgment, if the declaration state the judgment to have been recovered in a term different from that which appears on the record, it is a failure of record. It is also a

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1788. peared that the judgment in question was recovered in an action brought by the defendant against the present plaintiff and one *William Avarne*, whereas the declaration stated it to have been only against the plaintiff—This he contended was a fatal variance.

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against
STANTON.

On both these grounds, but chiefly on the last, the Court gave

Judgment for the defendant (a).

But afterwards leave was given to amend.

(a) See *Term Rep. B. R.* vol. 2. p. 356.

MEDDOWCROFT *against* HOLBROOKE.

A solicitor in Chancery may practise in the equity side of the Exchequer without being admitted a solicitor in that court.

THE plaintiff brought an action against the defendant for 126*l.* 3*s.* 4*d.*, the amount of his bill as an attorney and solicitor in the King's Bench, Common Pleas, Chancery, and equity side of the Exchequer. To this there was a set-off, and the balance due to the plaintiff was 25*l.* 1*s.* 6*d.*, for which a verdict was found, subject to a reduction, if the court should think fit, of such part as was charged for business done in the equity side of the Exchequer, he not being a solicitor of that court, though he had been admitted in Chancery. A rule having been obtained to shew cause why the verdict should not be rectified, by reducing the sum from 25*l.* 1*s.* 6*d.* to 3*l.* 4*s.*,

Bond and Cockell, Serjeants, shewed cause, arguing that the plaintiff did not come within the meaning of the 24th section of the statute of 2 *Geo.* 2. c. 23. It is not necessary that an attorney should be admitted in the same court in which he occasionally acts. If he be admitted in one court, he may act in another, by consent of an attorney of that other. Solicitors in courts of equity ought to have this privilege as well as attorneys in common law courts. But a consent in writing is unnecessary, in courts of equity, where the proceedings are in the names of the clerks in court.

Lawrence and Runninton, Serjeants, in support of the rule, contended that the plaintiff was strictly bound by the act, the third section of which prohibits any person from acting as solicitor in any court of equity without being admitted in such court, which prohibition is not relaxed by the 10th section, which relates only to attorneys; but even if it extended to solicitors,

a con-

a consent in writing was necessary, which the plaintiff had not obtained. 1788.

Lord LOUGHBOROUGH—The statute of the 2 Geo. 2. c. 23. is a penal law, and ought to be strictly construed. The 3d and 7th sections are confined to persons who practised before the act passed, and therefore cannot refer to the 24th, as to the present case. The words of the 24th section are, “without being admitted and inrolled as aforesaid.” The answer is, the plaintiff has been admitted and inrolled in Chancery; and being so admitted, he was entitled to practise of course on the equity side of the Exchequer. A previous consent in writing is necessary in a court of law, but would have been useless where the proceedings are in the name of the clerk in court.

Rule discharged without costs.

MEDDOW-
CRIFT
against
HOL-
BROOK.

STEEL *against* HOUGHTON & UXOR.

TRESPASS for breaking and entering the closes of the plaintiff at *Timworth* in the county of *Suffolk*, treading down grass and corn, &c. &c. and taking and carrying away corn, barley in the straw, &c. &c. done by the wife.

Plea—Justification, That the premises had been sown with barley, and the crop lately reaped, and carried off the land; “wherefore the defendants, being *parishioners and inhabitants of the said parish of Timworth, legally settled therein, and being poor, necessitous, and indigent persons*, after the crop growing in the year aforesaid, in and upon the said close, in which, &c. had been reaped, cut down, taken and carried away by the said plaintiff from and off the said close, in which, &c. to wit, at the said times when, &c. the said *Mary* (the defendant) entered into the said close, in which, &c. to glean and gather the straw containing ears of barley, remaining and being dispersed and scattered abroad in the said close, in which, &c. after the said crop had been so reaped, cut down, taken, and carried away as aforesaid, being the *gleanings* of the said crop so remaining dispersed and scattered abroad in and upon the said close, in which, &c. &c. &c.”

A right to glean in the harvest field cannot be claimed by any person at common law. Neither have the poor of a parish legally settled such right.

To this there was a general demurrer.

This cause was argued in *Easter* term 1787, by *Le Blanc*, Serjt. for the plaintiff, and *Lawrence*, Serjt. for the defendants;

1788. and on a second argument in *Trinity* term 1787, by *Bolton*, Serjt. for the plaintiff, and *Rooke*, Serjt. for the defendant.

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These arguments were fully entered into by the court, who in this term gave judgment as follows :

LORD LOUGHBOROUGH :—When the claim of a right to glean was first brought before the court, it was laid *indefinitely* to be in *poor, necessitous, and indigent* persons. I was then of opinion against the claim.

1st, I thought it inconsistent with the nature of property, which imports exclusive enjoyment.

2dly, Destructive of the peace and good order of society, and amounting to a general vagrancy.

3dly, Incapable of enjoyment, since nothing which is not inexhaustible, like a perennial stream, can be capable of universal promiscuous enjoyment.

This right is now claimed by poor persons *legally settled*; but in this form also it is equally liable to objection. There can be no right of this sort enjoyed in common, except where there is no cultivation, or where that right is supported by joint labour; but here neither of those criteria will apply. The farmer is the sole cultivator of the land, and the gleaners gather each for himself, without any regard either to joint labour or public advantage. If this custom were part of the common law of the realm, it would prevail in every part of the kingdom, and be of general and uniform practice; but in some districts it is wholly unknown, and in others variously modified and enjoyed.

Although the division of parishes is of very high antiquity, yet a right to a maintenance by *settlement* was first introduced by the statute of the 43 of *Eliz.* In ancient times tithes were divided into three parts,—the first for the maintenance of religion, the second for the church, and the third for the poor; but the third division was a matter of *charity* rather than of *right*. When by the second *Lateran* council, in the twelfth century (a), tithes were appropriated to particular parishes, they were not considered as making in any part a provision for the poor, which might be claimed as a right.

Although the law of *Moses* has been cited as a foundation for this claim, the political institutions of the *Jews* cannot be obligatory on us, since even under the *Christian* dispensation the relief of the poor is not a legal obligation, but a religious duty.

(a) *A. D.* 1132.

The authority in *our law* upon which the right to glean is supported, is a dictum of Sir *Matthew Hale*, in the *Trials per Pais*; but though I entertain the highest respect for the authority and character of that great Judge, yet it would be doing injustice to his memory, to take every hasty expression of his at *nisi prius* as a serious and deliberate opinion. In truth, that dictum imports no more than that the question could not be raised without being put upon the record.

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The consequences which would arise from this custom being established as a right, would be injurious to the poor themselves. Their sustenance can only arise from the surplus of productive industry: whatever is a charge on industry, is a very improvident diminution of the fund for that sustenance; for the profits of the farmer being lessened, he would be less able to contribute his share to the rates of the parish; and thus the poor, from the exercise of this supposed right in the autumn, would be liable to starve in the spring.

GOULD, J.—Supposing a general right of leasing (lesing) in *England*, I think it must be in the case stated in these pleadings, which is after the crop is reaped and carried away, and for the poor and indigent parishioners. If there be such a general right, it must be by the common law of the land: and though it should be admitted that in certain places there may be particular regulations of its exercise by custom, that will not derogate from the general right, any more than special modes of descent in certain districts will derogate from the course of descent by the common law, which will be intended to prevail, unless a custom is shewn to the contrary.

In the case of *Worlledge v. Manning* (a), in this court it was well observed by my brother *Walker* (a very learned and accurate lawyer) that it was a singular task to be called upon to prove the general common law of the land: that depends on

(a) *WORLLEDGE against MANNING*, East 26 Geo. 3. C. B.

Trespass for breaking and entering closes, &c. &c. taking corn, &c. &c.

Justification, That the said closes had been sown with wheat, barley, &c. &c. — That the crop was reaped, and after it was carried off the land, the defendant being a poor, necessitous, indigent person, entered, &c. to glean and gather the straw containing ears of corn remaining and being dispersed and scattered abroad in the said closes, &c. after the crop had been reaped and carried away, &c. being the gleanings of the said crop for the necessary support of him the said defendant, &c.

Demurrer, &c.

Judgment for the plaintiff (3).

(3) [See *Lid. v. Lid.*'s edition of *Gilbert's Law of Evidence*, p. 509. where it is said that the court gave judgment for the plaintiff in this case on general demurrer, because 't

was not averred in the plea that the defendant was an inhabitant, at the time of the gleaning, of the parish where the lands gleaned were situate.]

1788. general knowledge, it being universally exercised, or so understood. Speaking for myself, I have always understood this custom to prevail in such parts of this country where I have been conversant, and never heard it doubted; and I cannot but impute the reason of so few passages in the books of our law recognising it, to the conviction of its being a right too well established and too notorious to be disputed.

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The first passage which I shall mention is that in *Trials per Pais* (a). In trespasss against one for gleanings on his ground, per Hale, Norfolk summer assizes 1668, "The law gives licence to the poor to glean, &c. by the general custom of England; but the licence must be pleaded specially, and cannot be given in evidence on Not Guilty."

This opinion is cited by Lord Chief Baron Gilbert, in his *Law of Evidence* (b); and after allowing that it ought to be pleaded, he says, "It had been a sufficient justification, for by the custom of England the poor are allowed to glean after the harvest; which custom seems to be built on a part of the Jewish law, that allowed the poor to glean, and made the harvest a general time of rejoicing."

Here the opinion of Hale is recognised by a learned Chief Baron, who affirms the right to be by the custom of England.

The next author who mentions it, is that eminent Judge, Mr. Justice Blackstone, a text writer, and with great deliberation: his words are (c), "It hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground, without being guilty of trespasss." For this he refers to Gilbert, and *Tri. per Pais, supra*; and then adds, "Which humane provision seems borrowed from the Mosakal law," and refers to *Leviticus* and *Deuteronomy*. This is in substance the same as is said by Gilbert.

I will read the texts in *Leviticus*.

Leviticus, c. 19. v. 9, 10. "And when ye reap the harvest of your land, thou shalt not wholly reap the corners of thy field; neither shalt thou gather the gleanings of thy harvest; and thou shalt not glean thy vineyard, neither shalt thou gather all the grapes of thy vineyard; thou shalt leave them for the poor and stranger: I am the Lord your God."

In *Leviticus*, c. 23. v. 22. there is the same prohibition to gather the gleanings of the harvest, and conclusion, "thou shalt

(a) 1st edition, p. 534.

(b) P. 250. 4th edit.

(c) 3 Comm. 212 and 213.

"leave

"leave them unto the poor and to the stranger: I am the Lord your God." 1788.

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From what better fountain could it be drawn than the Holy Scriptures? It was evidently founded on charity, and fit to be received in every country. It might be liable to be abused; but that would be redressed by the law, and the party abusing become a trespasser *ab initio*, as in other cases of abuse of a legal right or licence, the known case of coming into an inn or tavern, &c.

From *Selden* (a) it appears, that the actual property was vested in the poor, unless they absolutely neglected the collection, and then it belonged to the owner of the field; and it did not accrue to the poor as a *donation*, but a *legal right*.

It was thought to be of so sacred a nature, that it was exempted from *tithes* (b).

It hath been said, the established provision for the poor by the stat. 43 *Elix.* hath had the effect of abolishing this right, supposing it to have existed. But Lord *Hale*, *Gilbert*, and *Blackstone* had no such idea; they consider it as a *subsisting right*, without regard to that provision.

Indeed there seems to me to be no ground to support such a notion. I think *ever since the settlement of parishes*, the *poor inhabitants* were esteemed as parishioners, and their *necessities to be relieved* by the parish to which they belonged.

Under the *Saxon* constitution they were restrained to villis, and the inhabitants were to be in pledge, or in *manupast*; the policy of which was admirable, to restrain them from becoming vagabonds, in subjecting those who received them, if they suffered them to continue above three nights, to answer for their misdeeds.

After the institution of parishes, we find in that ancient treatise *The Mirrour* (c) this paragraph: "It was ordained that the poor should be sustained by the parsons, rectors of churches, and by the parishioners, so that none should die for want of sustenance." This necessarily supposes the residence of the poor. This is strongly enforced by the statute 15 R. 2. c. 6. which, reciting that damages happen to parishioners by appropriation of benefices of the same places, enacts, that "upon a

(a) De jure naturali et gentium juxta discip. &c. *Ebræ. lib. 6. c. 6.*

(b) *Seld. Hist. of Tithes*, vol. 6. p. 1087.

(c) *Ch. 1. p. 14.*—This passage is cited in 3 *Inst.* 103.

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“ licence of appropriation of a parish church, the ordinary shall ordain
“ a convenient sum to be distributed yearly of the profits of the church,
“ by the appropriators, to the poor parishioners, in aid of their living
“ and sustenance.”

The effect of the 43d of *Eliz.* is to establish a more clear and strict obligation on parishes for the maintenance of the poor; and the very description of the officers is *overseers of the poor* of the same parish. Since that act, modes of obtaining settlements in parishes, and for removing or sending the poor thither, have been introduced; but before, it seems, the settlement was by *birth*; and the provisions were first made by the stat. 22 *H. 8.* (a) for sending vagrant or wandering persons to the parish where *born*, if it could be known, otherwise where they last dwelled for *three years*; and by the 39th *Eliz.* (b) where *born*, if known; if not, then to the parish where they last dwelled for the space of *one year*; and if neither known, then to the parish where they last passed without punishment; so that it is evident they were restrained in point of *residence*, and the place of *birth* was the primary object; and there according to *The Mirrour*, confirmed by the act of 15 *Rich. 2.* their wants and necessities were to be provided for. In this light the recital in the 15th *R. 2.* of damages to the parishioners, and the provision for future appropriations in aid of the poor, are clear and intelligible.

The stat. 39 *Eliz.* rendered begging and wandering abroad inexcusable, but affords no ground for construction to take away the charitable and humane (as *Blackstone* calls it) provision for the poor, permitting them to gather the derelict ears of corn, after the owner has carried away the crop. Nor is there a colour to say, that the practice has been discontinued since that statute, or that any such idea occurred to either of those lawyers whose opinions have been quoted.

The etymology of the names which this custom has received in *England*, plainly proves, that the custom itself was known both in *Germany* and *France*. *Minsbaw*, in *voce Glean*, explains them thus:—The French, *Glainer*, quasi *Graner*, i. e. *Colligere Grana*; the Belgic, *Arenlesen*; the Teutonic, *Ahrlesen*, ex *Ahr*, *Spica*, and *Lesen*, i. e. *Colligere*; and goes on with the Spanish, &c. Then follows—*A Gleaner* or *Leaser* of Corn; French, *Glancur*; Teutonic, *Ahrlesen*; Belgic, *Ahrenlefer*; English, *A Leaser*.

(a) 22 *H. 8. c. 12.* *Roßall's* edition.

(b) 39 *Eliz. c. 4.* *Roßall's* edition.

It is clear to me, the word *leafing* was brought from the *German*s, and *gleaning* from the *Normans*; and that from *abr* proceeds *abrist*, used in many parts of *England* for stubble.

Plato says, "*Qui intelligit nomina, res etiam intelligit*;" and Isidorus, "*Nomina rerum si nescis, perit cognitio rerum*."

In the case of *The King v. Price, & Burr*. 1927. Mr. Justice Hewit says, "The right of leafing does appear in our books (he must mean in *Trials per Pais*, and *Gilbert*); but it must be "under proper circumstances and restrictions." I presume he means after harvest or clearance of the crop, and in a proper manner and time; or, in case of a custom, that such custom is to be observed.

With respect to the exercise of this right, the case upon this record states, that what the defendants did, was after the crop was carried. This corresponds with Lord Chief Baron *Gilbert*'s expression of *after the harvest*. As to the times of beginning it, it appears by *Selden*, as already mentioned, that it ought not to be delayed; for a palpable neglect would be a desertion of it. If no precise time were limited, our law would call it a convenient time.

By an act of parliament passed in the year 1786, for inclosing the common fields of *Basingstoke*, the gleanings or leafing is to begin after the crop is carried. *Times* are mentioned, one for wheat, and another for other species of grain, for the exercise of this right; and *the owners of the land are restrained under penalties* (a strong circumstance to shew their sense of the right of the poor) from putting in cattle or hogs, within those respective times. On the other hand, the poor are restrained, by a summary penalty, from breaking the fences (which, it might be apprehended, from the former open state, they might be apt to do) and are confined to pass through the gates.

This seems to have been a prudent regulation to prevent disputes. I will recite the provisions made by the act.

"And whereas the poor people of the town of *Basingstoke* aforesaid have, time immemorial, claimed, exercised, and enjoyed the privilege of gleanings or leafing, in, over, and upon the said common fields, when and as soon as the corn has been carried from the same, in the time of harvest, in every year, which privilege the owners and proprietors of the said common fields are desirous of continuing to the said poor people, under

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1788. " under proper regulations; be it therefore further enacted, that
 " the poor people of *Basingstoke* aforesaid may, and they are
 " hereby authorised, from time to time, and at all times after
 " the passing of this act, to enter and go into and upon all and
 " every the lands in the said common fields, to glean or lease in
 " the time of harvest; provided that none of the said poor people
 " do or shall enter into and upon any such land for the purpose
 " aforesaid, until the crop or crops growing therein shall be
 " cleared or carried off by the owners or occupiers of such land
 " and the owners of the tithe, and that none of such poor people
 " do or shall continue to glean or lease in any such land for any
 " longer time than six days, if the same shall have been sown
 " with wheat, and three working days if sown with any other
 " corn, to be computed from the time of clearing and carrying
 " off the same as aforesaid; and in case any of such poor people
 " do or shall, at any time after the said intended division and in-
 " closure shall take place, glean or lease, or enter for that pur-
 " pose into any of the new allotments to be made by virtue of
 " this act, before the crop or crops growing therein shall be
 " cleared or carried off as aforesaid, or shall break, or tread
 " down, pull up, prostrate, destroy, or damage any hedge or
 " fence belonging to any of the said new allotments as aforesaid,
 " in going to or returning from any such land to glean or lease,
 " or, under pretence of going to or returning from any such land
 " to glean or lease, shall go into or return out of any inclosure,
 " by any other way than the gate or way through which the corn
 " shall have been carried out or from such inclosure, or over any
 " stile within the same, every person so offending shall for every
 " such offence forfeit and pay any sum not exceeding five shil-
 " lings, as the justice before whom such information and com-
 " plaint shall be exhibited (as hereinafter mentioned) shall think
 " meet, over and above such penalties as are inflicted on the said
 " offenders or offender, for either of the offences aforesaid, by
 " any law or statute now in force.
- " And, in order that the said poor people may not be deprived
 " of such privilege as aforesaid, by cattle or swine being turned
 " into the said lands during the time of their being authorised
 " to glean or lease as aforesaid, be it further enacted, that in case
 " any owner or occupier of the lands within which the said
 " poor persons are authorised to glean or lease as aforesaid do, or
 " shall

" shall permit or suffer any cattle or swine to be turned into or
 " remain in or upon any such land, to depasture or feed therein,
 " before the expiration of the time hereinbefore allowed for
 " gleanings or leasing in such land, every such owner or occupier
 " shall, for every day or less time such cattle or swine shall be
 " depasturing or feeding as aforesaid, forfeit and pay for every
 " head of cattle the sum of two shillings, and for every swine the
 " sum of one shilling."

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The act calls it a *privilege*, but says it had been *claimed* and *exercised* from *time immemorial*. What is this but a right? the enjoyment of which the landholders secure to the poor, by *penalties* on themselves.

Upon the whole, therefore, I am of opinion, that judgment ought to be for the *defendants*.

HEATH, J.—This is a demurrer to a plea of the defendant's, who justifies the trespass of his wife in the plaintiff's close, under a *claim of gleaning*.

On these pleadings the general question is. " Whether the
 " indigent and necessitous poor of a parish have a *right to glean*
 " after the crop is carried away?"

It is our province to take notice of all general customs. This is usually not attended with much difficulty, as the evidence of such customs is to be found in our books, and is matter of general practice. Although it is insisted on, that this custom of gleaning is coeval with the constitution, and derived from the most remote antiquity; yet the first mention of it is in the *Trial per Pais*, a mere extrajudicial opinion of Lord Chief Justice Hale, " That by the custom of *England* the poor have a
 " right to glean." The next author who mentions it, is Lord Chief Baron Gilbert, who, in copying the above passage with a marginal reference, says, that the poor are "*allowed to glean*," which implies a *licence* and *permission*, rather than a *right*. Mr. Justice Blackstone has received the same passage into his Commentaries, not as a clear and undeniable rule of law, but with expressions of distrust and doubt, and gives no opinion of his own. The whole weight then of legal authority to prove this custom rests on the *dictum* of Sir Matthew Hale.

It has been argued in favour of this claim, that no corn is claimed but what is abandoned by the owner; as if the owner had cast it from him, and it became the property of the poor by
 a fort

1788. a sort of occupancy. By the law of *England*, no property can be lost by abandonment, for the owner may at any time resume the possession. Here there can be no abandonment, as the owner never parted with the possession.

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Such a custom as will support the plea, must be universal, and every where the same, otherwise it is void for its uncertainty. If it exists only in particular counties or districts (such as the custom of being discharged from the payment of tithes of wood in some hundreds in the wilds of *Kent* and *Sussex*, or the custom of gavelkind) it is *partial*, and no part of the *general customs* of the realm. From the best inquiries I have been able to make, I find that this custom is not *universal*. In some counties it is exercised as a general right; in others, it prevails only in common fields, and not in inclosures; in others, it is precarious, and at the will of the occupier. In the county where this action was brought, it never in practice extended to barley; nor is the time ascertained. In some counties the poor glean whilst the corn is on the ground; here the usage is laid to be after the crop is harvested.

The practice of gleaning was originally eleemosynary. But it is the wise policy of the law not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of *legal obligation*. If *A.* and his ancestors have from time immemorial repaired a bridge or a highway, there is no *obligation* on him to *continue* the repair, unless he is so bound by the tenure of lands, or the like.

Wherever there is a right the law provides a remedy, if that right be obstructed. But suppose the owner of a field were to set fire to the stubble, or to flood it, and prevent the poor from gleaning, what remedy could they have? No action on the case has ever been brought for such an injury, and according to the reasoning on the statute of *Westminster* 2d (a), no action on the case would lie.

Tithes are due of right, and by the general usage of the realm; but the parson had no remedy at common law till they were set out, therefore the consent of the occupier of the land was necessary to be obtained before the parson could take a single sheaf. The case of *tithes* is much stronger than that of *gleaning*, because the church was originally endowed by the owners of lands,

(a) 13 Ed. 1. c. 24.

and

and the parson, in consideration of that endowment, undertook the cure of souls; so that there was a valuable consideration for the right of tithes, which is wanting with respect to gleaning. Yet the wisdom of our ancestors left it to the conscience of the occupier of the land, whether or not he would set out his tithes, though that conscience was to be corrected by the authority of the spiritual court.

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I shall next consider what force this custom derives from being a *Jewish* institution. Every institution which is to be found in the law of *Moses* was not enforced by the judge, many of them being left to the consciences of men with temporal blessings on those who observed them. The right of gleaning is given by the same law as well to the "*stranger*" as the "*fatherless* and *poor*." We have already infringed it, as we have decided that the *stranger* has no right to glean in the case of *Worlledge v. Manning*.

The law of *Moses* is not obligatory on us. It is indeed agreeable to christian charity and common humanity, that the rich should provide for the impotent poor; but the mode of such provision must be of positive institution. We have established a nobler fund. We have pledged all the landed property of the kingdom for the maintenance of the poor, who have in some instances exhausted the source.

The inconvenience arising from this custom being considered as a *right* by the poor, would be infinite; and in doubtful cases, arguments from inconvenience are of great weight. It would open a door to fraud, because the labourers would be tempted to scatter the corn in order to make a better gleaning for their wives, children, and neighbours. It would encourage endless disputes between the occupiers of lands and the gleaner. It would raise the insolence of the poor, and leave the farmer without redress. Experience shews that during the time of harvest, the poor employ their time in gleaning, to the great detriment of husbandry. In many places the farmer ploughs the land while the shocks of corn are upon the ground. Is the cultivation of the country to stand still while the labourers are gleaning?

It has been alleged as a reason for this claim, that the poor ought to have a share of benefit, at the time of general rejoicing. To this it may be answered, that they receive from the advanced price of labour, a recompence in proportion to their industry.

1788. But to sanction this usage, would introduce fraud and rapine, and entail a curse on the country.

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To conclude, as there is no evidence of this custom of glean-
ing prevailing uniformly throughout the kingdom, as the prac-
tice of it is uncertain and precarious, and as it would be attended
with great public inconvenience, if it were enforced as a *right*,
I am of opinion, that it is not *part of the general law of the land*;
that the plea is therefore bad, and judgment must be given for
the plaintiff.

WILSON, J.—I am of the same opinion with my Lord Chief
Justice, and my brother *Heath*, on the question now before the
court.

No right can exist at common law, unless both the *subject*
of it, and *they who claim* it are *certain*. In this case both
are *uncertain*. The subject is the scattered corn which the far-
mer chooses to leave on the ground, the *quantity* depends entire-
ly on his pleasure. The soil is *his*, the culture is *his*, the seed
his, and in natural justice *his* also are the profits. Though his
conscience may direct him to leave *something* for the poor, the
law does not *oblige* him to leave *any* thing. The *subject* then is
uncertain and precarious.

Next, the persons *claiming* this right, are vague and unde-
fined. The term *poor* is merely relative. Before the statute
of the 43d of *Eliz.* there was no method of *legally* ascertain-
ing who were of that description. Since that statute, justices
and overseers are to determine what persons are of the number
of *poor*, to whom also must be added the qualification of a settle-
ment. It cannot be urged that the demurrer admits that the
claimants are *poor*, because a demurrer admits nothing but what
is *well pleaded*, and here the matter is *ill pleaded* on account of its
uncertainty.

They who *claim* this right then, are equally *uncertain and*
precarious.

The practice also of glean-
ing is itself uncertain and change-
able. In some counties it is entirely excluded, in others partial-
ly admitted, and in others modified with every possible variety.

The law of *Moses* is not binding on us, except so far as we
have thought proper to adopt it. There are many precepts of
the *Gospel* which the law of *England* does not *enforce as obliga-*
tions. It is the duty of every man to "*honour his father and*
mother,"

"mother," but the law of England has no method to compel such honour. Charity to the poor is also a christian duty, but it must be voluntary, and cannot be compelled. 1788.

But, if there be a right, there must also be a remedy if that right be infringed. Now, if a rich man were to glean in a harvest field, to the exclusion of the poor, they could have no remedy. So if a farmer were to give permission to his brother, or friend of another parish, to glean his fields, the poor of his own parish could have no remedy in law, for what they might think a prior right. STEEL against HOUGHTON ET UX.

Next, the authorities are to be considered. The passage cited from the *Trials per Pais*, contains a *dictum* but not a judicial opinion of Sir Matthew Hale. Every one who hears me must acknowledge the impropriety of construing all the conversation which passes between a judge and the counsel at *Nisi Prius*, as legal decision. It would, in this instance, be a want of respect to the memory of Hale, to argue that he meant to give a serious opinion on the right of gleaning, when his *dictum* tends only to prove that such a right must be pleaded, and not given in evidence under the general issue. Gilbert and Blackstone have copied from Hale. In the case of the *King v. Price*, 4 Burr. 1927. Mr. Justice Yates says, "as to the right of leasing it will be time enough to determine that point when it comes directly in question." This is a full answer to the argument "that there are no cases on this subject, because the custom was too well established to admit of a question."

But it has been farther argued, that the farmer having abandoned the leavings of his crop, the poor are entitled to them.

Now supposing a right could arise from abandonment, it would be in the first occupier, the property would be as in a state of nature, the poor could not have any exclusive right. But the truth is, there can be no abandonment, while the property remains on the soil of the owner. It might, with as much reason, be urged, that a man had abandoned the property of his horse, who having right of common, had turned him out to pasture.

For these reasons therefore, I am of opinion, that the law should not interfere in this case, but that every man's conscience should be his law.

Judgment for the plaintiff.

1788.

ELMES *against* WILLS.

Where there is a promise to pay a bill of exchange within a fixed time, if during that time no proof be brought of its being already paid, though the promise be broken (no proof being brought within the time,) and the plaintiff in an action on the bill with an *infimul computassent*, gives evidence under the *infimul computassent* of the special promise, yet the defendant may also prove under that count, that the debt, for which the bill was originally given, was paid, and thereby avoid the promise by shewing it was without consideration.

ASSUMPSIT, by the indorsee of a bill of exchange against the drawer, the bill being refused acceptance—2d, count for money paid—3d, money had and received—4th *Infimul computassent*.—

Plea, General Issue, and Set-off.—

This cause came on to be tried before Mr. Justice Gould, at Hertford assizes, in the Summer 1787.

It appeared in evidence, that the plaintiff and defendant had mutual dealings together, and had applied to one *Rawnsley* to settle their accounts, who had accordingly adjusted all matters in dispute, except the bill on which the action was brought. This the defendant said, he could *prove he had paid*. Upon which it was agreed, that the bill should be deposited in the hands of *Rawnsley*, and if the defendant brought proof of the payment within a month, the bill should be delivered up to him, if not, *he promised to pay it to the plaintiff*. No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it.

The counsel for the defendant offered to give evidence that the original debt was paid, for which the bill was given, and that the defendant could not, within the month, find the witness by whom it might have been proved, according to the agreement, he having absconded to avoid an arrest.

But this evidence the judge refused to admit, holding that the defendant was bound by his agreement to pay the bill, if he did not bring the necessary proof within the month (a).

In *Michaelmas* term last a rule was obtained to shew cause why a new trial should not be granted, on the ground, that this evidence ought to have been admitted. *Lawrence*, Serjt. shewed cause against the rule, and *Rooke* Serjt. argued in favour of it.

Now in this term,

GOULD, J.—After stating the facts, said, That he was of opinion at the trial, that the plaintiff had a right to prove the special promise of the defendant, under the general count of *infimul computassent*, on the authority of *Buller's Nisi Prius*, p. 139, and that promise not being performed, was entitled to recover, the defendant not being at liberty to bring evidence

(a) See 1 *Lew. 663. Cro. Jac. 381.*

in excuse for his non-performance, where the undertaking was peremptory. That such an undertaking was upon sufficient consideration, he cited the case of *Amie v. Andrews*, 1 Mod. 166. and *Knight v. Rusworth*, Cro. Eliz. 469. 1788.

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against
WILLS.

The rest of the court were of opinion, that though this was a new promise on a special agreement, and though under a general count of *infirmul computassent*, such a promise might be given in evidence, yet as in the present instance it was to pay an old debt, the condition not being performed, it was to be considered only as evidence of the debt, and the effect of it was, to shew that the plaintiff had *prima facie* only, a right to recover. The defendant therefore ought to have been admitted to prove that the debt was discharged, because by so doing, he would avoid the promise by shewing there was no consideration for it.

Rule absolute for a new trial.

FRAMPTON *against* PAYNE.

LE Blanc, Serjt. moved for judgment as in case of a non-suit, issue having been joined in this cause within the six first days of last term, and no notice of trial given. Where issue is joined early in a term, notice of trial must be given in the same term.

Runnington, Serjt. contended that the court would not compel the plaintiff to take two steps in the same term; that notice of trial is not necessary to be given in the same term in which issue is joined. [See post. p. 123. *Baker v. Newman.*]

But the court were of opinion against the plaintiff, as there was time enough in the term to have given notice, and therefore made the

Rule absolute (10).

(10) In the court of K. B. the plaintiff is not bound to give notice of trial till the term after that in which issue is joined. *Hall v. Buchanan*, 2 Term Rep. B. R. 734.

JACQUES *against* WITHEY and REID.

THIS was an action of *assumpsit* brought against the defendants as partners and keepers of a lottery office, to recover back a sum of money paid by the plaintiff, for insuring tickets in the lottery of 1781. Money paid for insuring tickets in the lottery may be recovered back from the keeper of the office. A contract declared by a statute to be illegal, is not made good by a subsequent repeal of the statute.

At the trial the plaintiff was nonsuited, on the ground that both parties being engaged in an illegal transaction, a court of justice could not be called upon to the aid of either.

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F

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Adair, Serjt. having obtained a rule to shew cause why the non-suit should not be set aside, in *Hilary* term last, *Bond*, Serjt. shewed cause, and contended that where a man comes for relief to a court of justice, he must appear to have acted in a lawful manner. Here the plaintiff had tempted the defendant to insure in defiance of a positive statute (a). Though the penalty might only attach on one, both were in the eye of the law to a certain degree criminal. The directory and declaratory parts of a law are as much to be attended to as that part which inflicts the penalty. This law had directed that no such insurance should be made, and if it were made, that the contract should be void. When the statute was to be considered as acting upon the offence itself, it ought to be liberally expounded, to repress the evil which it was calculated to restrain; though when the inflicting the penalty was in question, it might only affect the keeper of the lottery-office. If the construction were otherwise, the greatest encouragement would be given to gaming, by permitting the gamester to recover back the money, which he had risked. The true distinction seemed to be, that where two persons acted in concert to evade the law, neither of them could apply to a court of justice for relief, unless there appeared circumstances of fraud or oppression used by one party to the other. This principle is to be collected from the cases on the subject. In (b) *Jaques v. Golightly* the lottery-office keeper refused to pay what the plaintiff had won, and yet insisted on retaining the premiums, and on this ground the Chief Justice and the court founded their decision. Notwithstanding the doctrine laid down by Mr. Justice *Blackstone* in that case seems to imply that the office-keeper alone was criminal, it was not necessary to decide so much. In (c) *Clarke v. Shee and Another*, Lord Mansfield has expressly said that both the office-keeper and insurer were equally criminal, and also that the law will not protect either party, except where there has been fraud or delusion. The same distinction is recognized in *Lowry v. Bourdieu* (d). In the present case the plaintiff had received all the winnings, and yet came before the court to recover back the consideration on which they were paid (e).

But on another ground the non-suit may be supported. This gaming in the lottery was before the 25th of July 1782, and

(a) 19 Geo. 3. c. 21. repealed by 22 Geo. 3. c. 47.

(b) 2 Black. 1073.

(c) Cowp. 197.

(d) Dougl. 451.

(e) But *quære* as to this fact, that the plaintiff had received all the winnings? If he had, perhaps the court would have given a different judgment.

the action commenced *after* that date. All transactions of this sort relating to lotteries before that date, are buried in oblivion by the 22 Geo. 3. (a) which repeals all other acts respecting the regulation of lottery offices, and only provides that the repeal shall not operate upon actions commenced or depending *before the commencement of the act*. The right of action then in the present case is taken away, and it is now the same as if gaming in the lottery of 1781 had never been prohibited. *Miller's case* (b) is an authority to prove, that offences committed against a repealed clause in a statute before its repeal, cannot be punished after the repeal without a special exception.

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Adair in support of the rule. This action is not brought upon the 19th Geo. 3. for a penalty, but to recover back money paid upon a void and illegal consideration; it cannot therefore be affected by the repeal of that statute.

It is a principle of law, that money paid on a void contract may be recovered back again, and the question as to the validity of the contract must relate wholly to the time of making it; if it was *then* void, it is not material by what means it was rendered so. If it had been originally a good contract, and a statute had passed to make it void, and then that statute had been repealed, the contract would have been set up again. But here there was *originally a void contract*, being entered into while the statute was in full force, and therefore cannot be made valid by the repeal.

In the case of *Lowry v. Bourdieu*, the judgment of the court was founded on the circumstance of both parties being equally culpable. Here the keeper of the lottery-office is the only person upon whom the prohibition or penalty attaches. In that case it is true that Mr. Justice Buller said "there is a sound distinction between contracts executed and executory," but that was not the *ground of the decision*; it was only the opinion of a single judge, however eminent, and is contrary to the case of (c) *Smith v. Bromley*, which was on a contract executed.

Where an action is an *affirmance* of an illegal contract, and the object of it is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained. But where the action proceeds in *disaffirmance* of such a contract, and instead of endeavouring to enforce it presumes it

(a) c. 47. s. 27.

(b) 1 Black. 451.

(c) Cited in the notes of *James v. Barkl. Dougl.* 696.

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and REID.

to be void, and prevents the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover. An attention to this distinction will reconcile many of the cases on this subject, which appear at first sight to be somewhat inconsistent. *Clarke v. Shee* and *Johnson (a)*, *Browning v. Morris (b)* and *Jakes v. Golightly (c)*, are expressly in favour of the plaintiff, and ought to be relied on.

Cur. vult advis.

In this term,

Lord LOUGHBOROUGH declared the unanimous opinion of the court, that the objection raised on the repeal of the statute ought to be over-ruled; and that the other three judges (*contrary to his opinion*) thought the case of *Jakes v. Golightly* good law, and fit to govern the present.

Rule absolute.

(a) *Cowp.* 197.

(b) *Cowp.* 799.

(c) 2 *Black.* 1073.

THE END OF TRINITY TERM.

The Reporter having been favoured with the following Case, conceives that it will not be unacceptable to the Profession, though of a Date prior to the Commencement of his Undertaking.

HARRISON *against* BULCOCK and six others.

(Hilary term, 28 Geo. 3. 1788.)

A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax.

TRESPASS for taking the goods of the plaintiff—Plea general issue—Verdict for the plaintiff, subject to the opinion of the court on the following case:

The plaintiff at the time when the goods were taken was treasurer of *Guy's Hospital*, in the parish of *St. Thomas, Southwark*. By an assessment made on the 19th of *May* 1786, he was assessed to the land tax for the house in which he lived. Five of the defendants were commissioners, and the other two collectors. The plaintiff appealed to the commissioners against the rate, who dismissed his appeal. On his refusing to pay the sum assessed, the goods in question were taken under a warrant of distress.

The hospital originally consisted of only two squares, built on land demised by the mayor and commonalty of London as governors of *St. Thomas's Hospital*, to the founder, *Thomas Guy*, in the year 1720. 1782.

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and others.

By an act of the 11th of *Geo. 1.* certain persons were incorporated, in pursuance of the will of the founder, by the name of President and Governors of the hospital founded by *Thomas Guy*.

To whom being incorporated, the mayor and commonalty of London, as governors of *St. Thomas's Hospital*, demised another piece of land, in the parish of *St. Thomas, Southwark*, on which many houses, &c. stood, but which the said president and governors, by virtue of the powers vested in them by the act of parliament and the will of the founder, pulled down, and in their place built another square in addition to, and communicating with the hospital, in which square the plaintiff's house is situated.

No part of the ground on which the hospital now stands was ever part of the scite of *St. Thomas's Hospital*, but this ground before the two demises of it to the founder, and governors of *Guy's Hospital*, was covered with houses let to different persons, and in the year 1693, and from thence till the building of *Guy's Hospital*, was assessed to the land-tax.

The house in which the plaintiff lived has been constantly occupied by the treasurer for the time being, for whose sole use it was erected.

The plaintiff paid no rent for it, but occupied it as incident to his office.

Bond, Serjt. on behalf of the plaintiff contended, that he was exempted from payment of the land-tax, in respect of the scite of the hospital and the buildings within the limits of it, being slated to live in a building within those limits. He paid no rent for his house, but held it as incident to his office. The treasurer is the servant of the hospital, and as such protected by the exception given to the hospital. The protection given to charities is very ancient. It is to be found in the old Subsidy Acts, and was preserved in the first land-tax bill of *William the Third*. The Subsidy Act of the 1st *Eliz.* (a) contains a general exemption of hospital property, for it declares that it shall not extend to the goods and lands of any hospital, &c. used

(a) *Russington's Appendix*, vol. 10. p. 163. l. 34.

1788. *for the sustentation and relief of the poor, &c.* and the 4th of *W. & M. c. 1. s. 25.* contains a protection to the scite of hospitals, which has been inserted in all the land-tax bills which have been passed since the revolution, with the material addition of "*any of the buildings within the walls or limits of the hospital.*" From hence it is clear, that the legislature has been anxious to extend the exemption to the appendages of an hospital, which are inhabited either by the objects of the charity or the servants of it. The scite of a building means the land upon which the building and all its dependencies and offices are situated. The stat. 32 *H. 8. c. 20.* mentions the *scite* of monasteries, and under that description not only the land upon which the walls of a monastery were built, but the garden, orchard, and all the appurtenances may at this day be excepted from tithes. But lest the term might be ambiguous, the legislature expressly added the words "*any of the buildings within the walls, or limits of the said hospitals(a).*" Now what are these buildings? certainly such as are necessary to the hospital. The necessity of the superintendence of the chief officers is as obvious as that of the service of the inferior agents, and such officers must have a residence suitable to their rank. If the treasurer, chaplain, or physician be assessable, so are the porters, gardener, and other servants who live within the hospital. They have all an interest of the same nature, differing only in their respective emoluments which are proportioned to their several employments. They are all servants. By taxing either, the benevolent intentions of parliament would be defeated; for the reason of the exemption is a regard to the public funds of the hospital, which would be lessened by a tax laid upon the servants, who would look to the public stock for repayment. The funds of hospitals are but barely equal to the charitable purposes of their institution. If a tax be laid on persons who will be reimbursed out of the public funds of a charity, the charity itself is taxed.

The land-tax in this instance bears no analogy to other taxes. Under the window-tax the plaintiff would be assessable, because the act is positive that "all dwelling-houses shall pay." The poor's rate is a tax proportioned by a general estimate of the property of the rateable occupier. The plaintiff could not have any claim, in such case, on the treasury of the hospital for re-

(a) Land Tax Act, 27 Geo. 3. s. 25.

imbursement.

imbursement. But when charged with the land-tax, he is charged only with respect to his house.

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It is objected, that the part of the hospital buildings in which the plaintiff resides, stands upon land which once paid the land-tax; and that as a certain fixed sum must be raised by the parish, the *quota* to be paid by each individual will be increased, if any part which has before borne a share of the burthen should be discharged. Now it is true that a certain sum must be paid by every district; but whether that sum is to be collected from a greater or less number of individuals, depends upon the state of property within the district. This makes the principal difference between the ancient subsidy, and the modern land-tax. In the case of *The King v. The occupiers of St. Luke's Hospital*, 2 Burr. 1064. Lord Mansfield says, "*Whether property is chargeable by a rate or other payment, depends upon the will of the proprietor; the owner of a house may if he pleases, pull it down, and convert it into a toft: the owner of lands may suffer them to lie barren and unoccupied. Tithes and the rights of them vary, according to the different species of the produce of the land, yet the landholder may sow it, or plant it, or use it, in the manner he likes best, or even not at all, if he so chooses.*" As the parish then is to pay collectively a certain sum, the question in the present case is not between the hospital and the public, but between the hospital and the parish; the same contribution will be made to the public revenue, from whatever source that contribution may arise.

Le Blanc, Serjt. for the defendants, argued,—1st, That the court had no jurisdiction in the present case, the twentieth section of the act having made the appeal to the commissioners final.—2dly, That the exemption was meant by the legislature to protect only the buildings of hospitals at that time appropriated to the immediate objects of charity, and not to extend either to subsequent acquisitions, or to those buildings which were erected for the accommodation of the officers. This rule has obtained with regard to the poor's rates and window-tax. Buildings inhabited by the distressed objects of a poor's rate, are not assessed like those which are occupied by the necessary officers. There is no reason why the plaintiff should be protected from the land-tax when he is liable to the poor's rate and window-tax. In *The King v. Gardner* (a), it is expressly

(a) Cowp. 79.

1788. **HARRISON**
against
BULCOCK
and others.

said that the master of *Catherine Hall* was rated for his garden, upon which houses had formerly stood, and which had been purchased by the college and added to their lands.

The hospital could not be injured if the plaintiff were assessed, for he could have no claim to call upon the funds of the charity for reimbursement. The parish might be essentially injured, if the exemption claimed should be allowed and the hospital should go on to increase the buildings belonging to it, as the number of persons to pay the sum required would be continually lessened. But whether the dispute be between the parish and the plaintiff or the revenue and the plaintiff, the law is the same.

The opinion of the court was thus delivered by

Lord LOUGHBOROUGH.—This being a building within the limits of the hospital, not let nor yielding any profit, but in the occupation of a necessary officer, comes under the exemption of the act. That there might be no ambiguity in the word *scite*, the legislature goes on to say, “any of the buildings within the “walls or limits of the said colleges, halls, and hospitals.” None of the buildings therefore within those limits are chargeable, unless they are charged as such, in some other clause of the act, and no such clause is to be found.

The tax must be either on the owner or tenant of the hospital, but the plaintiff is neither owner nor tenant.

The objection to the jurisdiction of the court is of no weight, the appeal to the commissioners being alone final, when the question arises, as to the *quantum* of the tax, and whether lands belonging to hospitals, &c. were assessed as such in the 4th year of *William and Mary*, or have been purchased since that time.

Judgment for the plaintiff.

C A S E S

1782,

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Twenty-ninth Year of the Reign of GEORGE III.

PEARSON Demandant, PEARSON Tenant, and BROUGHAM Vouchee. *Wednesday, Nov. 12th.*

IN a recovery, a farm called *Thieffside*, otherwise *Thieveshead*, was described to be situated in *the forest of Inglewood, in the parishes of Hesketh in the Forest, and St. Mary's Carlisle, or one of them in the county of Cumberland.* It was afterwards discovered that the whole of the said farm was not within the parishes of *Hesketh in the Forest, and St. Mary's Carlisle*, as described in the recovery, but that part of it was in the parish of *Lazonby*, in the county of *Cumberland*.

The court will not grant leave to amend a recovery on affidavit only; it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment.

Band, Serjt. moved to amend the recovery, by inserting "*The parish of Lazonby*," on an affidavit of the owner of the land, the vouchee stating as above, and "that he meant to include all his estates in the county of *Cumberland* in the recovery, and that he did not know, when he suffered the recovery, that any part of the said farm called *Thieffside* was in the parish of *Lazonby*." In support of this motion he cited *Henzel v. Lodge*, 2 *Black.* 747. and *Cruise's Essay on Common Recoveries*, 183. 2d edit. (a)

The court would not on this affidavit alone grant leave to amend; but upon reading the deed to lead the uses, there was

(a) Reported also 3 *Will.* 154.

found

1788. found the following clause: " And all other the estates, manors,
 " or lordships, messuages, lands, tenements, and hereditaments
 " whatsoever, situate, lying, and being in the county of Cumber-
 " land." This was holden by the court sufficient to warrant an
 amendment, as it appeared on the face of the deed itself.

Rule absolute for the amendment.

Friday,
 Nov. 14th.

GAWLER v. JOLLEY.

The court
 will set aside
 proceedings
 against bail,
 if the *ca. fa.*
 be tested of a
 term prior to
 that in which
 judgment is
 signed against
 the princi-
 pal.

THE defendant was bail for one *Page*, against whom the plaintiff signed judgment on the 14th of *April* in *Easter* term last, and sued out a *ca. fa.* tested the 12th of *February*, the last day of *Hilary* term, returnable on the 19th of *April*, to which the sheriff returned *non est invent.* On this the plaintiff took out a *sci. fa.* against the defendant, tested the 9th of *April*, the first day of *Easter* term, returnable the 23d of *April*, and a second *sci. fa.* tested the 23d of *April* and returnable the 30th of *April*. On the 17th of *May* the plaintiff signed judgment against the present defendant, and sued out a *fi. fa.* under which his goods were taken by the sheriff.

A rule was obtained to shew cause why the proceedings should not be set aside, and the goods taken in execution restored, the *ca. fa.* being tested the term before judgment was signed against the principal.

Le Blanc, Serjt. shewed cause, contending that the proceedings were regular; that though the *ca. fa.* was tested before judgment was signed, yet in fact it issued after; that it was common to sue out writs in vacation tested as of the preceding term.

Runnington, Serjt. for the rule, argued that the *ca. fa.* could not regularly be tested in a term prior to that in which judgment was signed; that the *sci. fa.* also ought to have been tested the day of the return of the *ca. fa.*

Le Blanc in reply. Bail are fixed in law at the return of the *ca. fa.*, but by indulgence four days' notice are allowed. Here the bail might have had notice by searching in the office. It is immaterial when the *sci. fa.* was tested, if there was sufficient time before the return.

The

The court held the proceedings irregular, as they said such practice would tend to fix the bail, without giving them an opportunity to surrender the principal, and therefore made the

Rule absolute.

1788.

CARLISLE

JOLLY.

SAUNDERSON v. MARR.

Monday,
Nov. 17th.

THE defendant being an infant, joined with his brother in giving a warrant of attorney to the plaintiff, to confess a judgment, which was accordingly entered up, and the defendant taken in execution. In order to procure his discharge, he alone gave a second warrant of attorney, on which judgment was again entered, and he again taken in execution. On this, a rule was granted to shew cause why the last judgment should not be set aside, and the warrant of attorney cancelled, on the ground, that the defendant was an infant at the time of giving it.

A warrant of attorney given by an infant, is absolutely void, and the court will not confirm it, though the infant appear to have given it, (knowing that it was not valid,) for the purpose of collusion.

Marshall, Serjt. shewed for cause, a declaration of the defendant, when he gave the second warrant of attorney, that he would take no advantage of his infancy, a promise to pay the debt, and some circumstances of collusion between him and his brother. This application, *Marshall* said, was made to the equitable jurisdiction of the court; and in equity, the acts of an infant are often confirmed; such as an agreement to settle an estate, and the like. But the court said—

Such acts of an infant as are only voidable, are allowed in equity to be confirmed, but not such as are actually void. A warrant of attorney is of the latter description, which the court cannot make good, though there appear circumstances of fraud on the part of the infant.

Rule absolute without costs.

1788.

Wednesday,
Nov. 19th.Neither an
attorney nor
an articled
clerk to an
attorney, can
be bail to the
action.

LAING v. CUNDALE.

MOTION to justify bail—It was objected by *Bond*, Serjt. that one of them was an *articled clerk to an attorney*.

The court, on considering the rule (a) made on this subject, held that being for the protection of attorneys, it extended to their articled clerks as well as themselves, and

Rejected the bail (b):

(a) *Mich. 6 Geo. 2.* It is ordered by the Lord Chief Justice, and the rest of the justices of this court, that from and after the last day of this term, no attorney of this or any other court, or any person practising as such, shall be bail in any suit or action depending in this court.

Collection of rules and orders of the court of Common Pleas, 8vo. edit. 1739, p. 258.

The same practice prevails in *B. R. Boulgne v. Vautrin*, *B. R. T.* 18 *Geo. 3.* cited in a note, *Dougl.* 466. last edition.

(b) [If bail be put in without any description, one of whom afterwards proves to be a clerk to an attorney, the plaintiff may take an assignment of the bail-bond. *Fenton v. Ruggles*, 1 *Bof. & Pull.* 356.]

Wednesday,
Nov. 19th.

MITCHELL and others, Assignees of ROBERTSON, v. GIBBONS.

Bail to the
sheriff are
liable beyond
the sum sworn
to and costs,
to satisfy the
whole debt
due, to the
full extent
of the penal-
ty of the
bail-bond.

THE defendant being arrested at the suit of the plaintiffs, for “50*l.* and upwards,” found bail, who entered into the common bail bond to the sheriff, in the penalty of 100*l.* The defendant not appearing, the bail paid to the plaintiff’s attorney 50*l.* and offered to pay the costs, which the attorney refused to accept, unless they would pay 29*l.* more; the plaintiff’s debt being in fact 79*l.* The bail not thinking themselves answerable for more than the sum sworn to and costs, refused to pay the overplus. The bond was assigned, and an action brought.

On which, a rule was granted to shew cause why the bond should not be given up, the sum sworn to having been paid, and a tender made of the costs.

In support of this rule, *Bond*, Serjt. contended, that the bail were liable to no more than the sum sworn to and costs; that the stat. 12 *Geo. 1.* (a) had expressly prohibited the sheriff from taking bail to a greater amount; if he were to do so, he would be subject to the penalty of the stat. 23 *Hen. 6.* as having acted *colore officii* (b). The case of *Jackson v. Hassall* (c), shews that

(a) *Cap.* 29.(b) *Cap.* 9.(c) *Dougl.* 350.

bail

bail are not liable to more than the sum sworn to and costs; in the present case, 50*l.* was the sum sworn to, and the costs had been tendered. Where indeed a judge makes an order to hold to bail, it is a matter of discretion in him to decide in what sum the bail shall be liable, but the liability of bail taken by the sheriff, is determined by the sum indorsed on the writ. If the sheriff were to take *no* bail, he would be only answerable for the sum sworn to, and costs.

1788.

 MITCHELL
v.
GIBBONS.

Adair, Serjt. argued against the rule, that by the constant practice of the courts, bail were bound in double the sum sworn to. The stat. 12 *Geo.* 1. prohibits the sheriff from taking *more* than double the sum. Where damages are uncertain, as in cases of tort, there they are measured by the discretion of the judge, but where they are certain, as in cases of contract, the oath of the plaintiff is to prevail, and then double the sum is required. But why require double the sum, if only the single demand is to be recovered?

The court took time to consider till the next day, when judgment was delivered as follows, by

Lord LOUGHBOROUGH.—We have considered this case, and find the practice, for more than fifty years past, to have been, that the bail are liable to the whole extent of the penalty of the bond, to satisfy the debt really owing to the plaintiff. Soon after the 12th year of *George* the First, namely, in the 1st of *George* the Second, the case of *Turner v. Bailey* arose, which was on a motion to set aside a judgment obtained upon a bail-bond; the defendant insisted, that such an action could not be maintained, because the bail-bond was taken in more than double the sum the plaintiff had sworn to be due; the court seemed to be of opinion, that if the judgment was regular, the point about taking more than double the sum, could not come in question; but, that this case might be settled, they put it off till the next term, it being a new point on the act of the 12th *Geo.* 1. c. 29.; but the parties having agreed, the point was not then settled: subjoined to this case, which is reported in *Cooke's Cases of Practice* (a), is the following note: "It seemed to be agreed, that the bail-bond may be taken in double the sum sworn due." The next case was in the third year of *George* the Second, reported in *Fortescue Aland* (b), and which was a demurrer to a declaration on a bail-bond, it appearing that

(a) Page 43.

(b) *Jennys v. Corstrey*, *Fortesc.* 3;6.

1788. the writ was for 30*l.* and the bond for 40*l.*; it was contended, that since the new act (meaning the 12th of *Geo.* 1.) the bond was void, being for more than the sum in the writ: but the court held it was not void, and that the act was directory to the sheriffs: and of this opinion were the court of Exchequer. In the 11th of *George* the Second, the same question came before the court in the case of *Male v. Mitchell* (a), in which, though the court seemed to think that the sheriff had done wrong in taking the bail-bond in more than double the sum sworn to, yet, they said, it would have been right for the sheriff to have taken the bond in double the sum sworn to, and indorsed on the writ. There is also a case in Mr. Justice *Blackstone's Reports* (b), on the same subject, in which a motion was made to stay the proceedings on a bail-bond, the defendant having paid his principal's whole debt, and his own costs, all except 40*s.* which he had tendered. but the court, on considering precedents, held, that the costs of the action against the principal and the other bail must also be paid, before the proceedings could stay. We have likewise consulted the officers of the court, who say that it has always been the received practice, that the bail are liable to the utmost extent of the penalty of the bail-bond, as far as justice requires, for the payment of the whole debt due, and the costs.

Finding, therefore, the practice to be thus established, we do not feel ourselves authorized to set it aside.

Rule discharged (c).

(a) *Pract. Reg. of C. B.* 67.

(b) *Walker v. Carter*, 2 *Black.* 816.

(c) [See *Stevenson v. Cameron*, 8 *Term Rep. B. R.* acc. and *Orton v. Vincent*, *Cowp.* 71. there cited.]

Wednesday,
Nov. 19th.

SPENCER v. GOTE.

The court will not alter a verdict, unless it appears on the face of it, that the alteration would be according to the intention of the jury.

THIS was an action for words, tried before Lord *Loughborough*, at the Sittings, at *Westminster*, after last *Trinity* term. The declaration consisted of six counts, the first five of which, were for accusing the plaintiff of being a *dog-stealer*, and *stealing a dog of the defendant*, and the last, for *maliciously and without probable cause* giving information before a justice, that there was *cause to suspect* that a dog which had been stolen from the defendant, was concealed in the house of the plaintiff; causing the justice to issue a search-warrant, and a constable to enter the house and search for the dog, which was neither found in

in the house, nor there concealed; nor was it otherwise in the possession or custody of the plaintiff, &c.

1788.

Plea—Not guilty; on which issue was joined.—2d, Justification, that the words spoken were true. Replication, *de injuriâ suâ propriâ absque tali*, &c. on which also issue was joined—

SPENCER
v.
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At the trial, there was sufficient evidence to support the counts for the words, it appearing that they were spoken, *after a search had been made in the plaintiff's house*, where the dog was not found; but it also appeared, that *there was probable cause* for the defendant's suspicion, and of course for his applying to the Justice for a search-warrant. Lord *Loughborough* therefore directed the jury to find for the plaintiff, on the counts for the words spoken, and for the defendant on the last. But they found a general verdict for the plaintiff with 1*s.* damages, and 40*s.* costs.

A rule having been granted to shew cause, why the verdict should not be entered for the plaintiff, on the first and second counts only, agreeable to the notes of the Chief Justice, or why it should not be set aside, and a new trial granted,

Le Blanc, Serjt. contended, that a general verdict having been found, the court could not interfere to enter it on any particular count, and determine on which part of the evidence it was grounded. To enter it on any particular count, it must appear from the notes of the judge, that the evidence applied only to that count. To grant a new trial, it must appear from the evidence, that the jury could not find the verdict which they have found.

Cockell, Serjt. in favour of the rule, urged, that the last count was not supported by evidence. There was no proof of malice, the defendant had good ground to apply for a search-warrant.

The court said they could not alter a verdict, unless it clearly appeared on the face of it, that the alteration would be agreeable to the intention of the jury; and that the proper remedy in this case was a new trial.

It was then recommended to the parties to agree to a new trial; which they afterwards did, and accordingly the

Rule was made absolute for a new trial (a).

(a) See *Williams v. Bradon*, 1 Bof. & Pull. 329. where a general verdict having been given on two counts, one of which was bad; and it appearing by the judge's notes that the jury calculated the damages

on evidence applicable to the good count only; the court amended the verdict by entering it on that count, though evidence was given applicable to the bad count also.

1788.

COHN v. DAVIS.

Saturday,
Nov. 22d.

Although an exception to bail has been regularly entered, and the defendant's attorney having had verbal notice of it proceeds by giving notice of justification, and attempting to justify, yet notice in writing of such exception must have been given, to make the sheriff liable to an attachment for not bringing in the body.

AN exception to bail was regularly entered in the filazer's book, of which the defendant's attorney had verbal notice, but afterwards proceeded by giving notice of justification, and attempting to justify bail who were rejected. The rule for bringing in the body having expired, and no bail being justified, an attachment was granted against the sheriff (a).

A rule was obtained to shew cause why this attachment should not be set aside, on the ground, that a written notice of exception was not given to the defendant's attorney.

Adair, Serjt. shewed cause, arguing, that under the circumstances of this case, the necessity of a written notice was waived, as the attorney for the defendant had received verbal notice of the exception being entered, and had afterwards himself given notice of justification, and in fact attempted to justify. He also contended, that notice of justification was an admission that notice of exception had been given.

Bond and Lawrence, Serjts. supported the rule. To shew that the practice of giving notice in writing was strictly to be observed, they cited the cases of *Satchwell v. Lawes*, 2 Barnes 61, and *Goswell v. Hunt*, 2 Barnes 83 (b). They also urged, that there was no waiver by the defendant; but even if there had been a waiver on his part, still the irregularity was not cured, as relating to the sheriff; for though "*Quisque potest renunciare juri pro se introducto*," yet a third person could not be affected by such a renunciation, particularly one who stood in a criminal view; in which a sheriff stands, under an attachment for contempt.

Per cur.

Where there are two parties, and one of them takes a step, previous to which the other ought to have taken a step, the former waives the obligation which the latter was under, as between themselves, but not as relating to a third person. Here the waiver by the defendant, if it were one, was not a waiver by the sheriff. The rule ought to be strictly followed to prevent confusion.

Rule absolute.

(a) *Ante*, 9 Thorold v. Fisher.

(b) Octavo edit.

1788.

WILLIAMS v. MILLINGTON.

THE plaintiff was an auctioneer, and employed by one *Crown* to sell his goods by auction. The sale was at the house of *Crown*, and the goods were known to be *his* property (a). The defendant bought goods to the amount of 7*l.* 9*s.* 6*d.* and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hand for five guineas, as for a debt due from *Crown* to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods. Afterwards the plaintiff being called upon by *Crown*, paid to him (who refused to accept the receipt) the whole sum for which the goods were sold to the defendant, and brought this action to recover the five guineas, in lieu of which the receipt was offered.

Saturday, New 21d.
An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be *his* property.

The declaration was for goods sold and delivered, with the usual money counts. —Plea, general issue. —Verdict for the plaintiff.

A rule was granted to shew cause, why this verdict should not be set aside, and a non-suit entered.

In support of which rule, *Adair*, Serjt. argued, that as the goods in question were known to be the property of *Crown*, and sold as such, the plaintiff was not entitled to bring an action for goods sold and delivered. He allowed, that where the possessor was the only visible owner, he might maintain this action, but here, public notice was given, that *Crown* was the owner. The plaintiff himself printed the proposals of sale, which was actually holden at the house of *Crown*. The goods were liable to every demand against *Crown* both at law and in equity, as much as if they had been bought of *Crown* himself, and he only, not the auctioneer, would have been answerable for a refusal to deliver. The payment of the money to *Crown* by the plaintiff, was in his own wrong, and therefore cannot be the foundation of an action; he could not be liable to the owner for more than he had actually received. If the plaintiff were permitted to maintain this action, the vendee would be deprived of the benefit of a set-off against the owner, and manifest injustice would ensue.

(a) This appeared from the printed proposals of sale, and the catalogue.

1788. *Marshall*, Serjt. also supported the rule: he contended, that as the owner of the goods might have brought this action against the defendant, so it was clear that the auctioneer could not bring it, because it is a rule of law to which there is no exception, that several persons cannot maintain distinct and separate actions on the same contract, against the same defendant. The inconvenience arising from different persons bringing separate actions on the same contract would be, that while the action was brought by one, the defendant might pay the other, and give the payment in evidence under the general issue. The law abhors multiplicity of actions, and therefore wherever it appears on record, that two writs have been sued out against the same defendant, for the same cause, the second shall abate. If two persons could bring separate actions for the same thing, as neither could have a priority, each might proceed at the same time, and the right being equal in both, neither could be pleaded against the other; if either could be pleaded against the other, each might be reciprocally, and then both must abate. If *Crown* were now to bring an action against the defendant, the present action depending could not be pleaded in abatement; such a plea would be bad, (because it would admit that the first plaintiff had a right to sue, and if so, the second had not,) and would amount to the general issue. If the auctioneer has a right to sue, it must be on a presumption that he gave the credit to the buyer, but if he gave the credit he alone can sue. If the goods were not delivered to the buyer, the owner would alone be liable to an action. The auctioneer never had possession of them, as they were sold on the premises of the owner. All the precedents of declarations shew that the owner must be sued.

The case of a factor stands upon very different grounds, arising from the custom of merchants and convenience of commerce. But the law relating to factors is not in favor of the present plaintiff; for though a factor to one beyond sea may maintain an action in his own name for goods sold, being the only visible owner, according to the doctrine laid down in *Buller's Nisi Prius* (a), yet in general, a factor is a mere agent or servant to the principal, and has only the custody of the goods, the property remaining in the principal. *Cowp.* 255.

The next point is, whether the plaintiff can maintain the count for money paid, for the sum he paid to *Crown*, after he

(a) *Gosselin v. Sladen*, p. 132.

had notice from the defendant not to pay it. One of the first principles of law is, that an *assumpsit* cannot be raised by payment of the debts of another against his will, 1 *Term Rep. B. R.* 20. Nor does it lie in the power of any man at his election, to vary the rights of two other contending parties. When *Crown* refused to take the defendant's receipt in payment, the plaintiff knew the subject of contention between them, and therefore, as he was not bound to pay more money than he had actually received, he elected, by paying the amount of the receipt, to deprive the defendant of the benefit of his claim on *Crown*.

1788.

 WILLIAMS
v.
MILLING-
TON.

Bond, Serjt. against the rule made two points; 1. Whether the plaintiff could maintain this action; 2. Whether the defendant might not have given evidence of the debt due from *Crown*.

As to the second point, he contended, that though under the general issue, evidence of the debt could not be given without notice of set-off, yet the defendant might have averred that the plaintiff was the agent of *Crown*, then stated the debt, and pleaded payment of the residue. That in an action on a bond brought by a trustee, the defendant had been permitted to plead a debt due to him from the *cestui que trust* (a). This was a liberal construction of the statutes of set-off, and of which the defendant might have availed himself; no objection therefore could be made by him, on this ground, to the present action.

The only question then was, Whether the plaintiff could maintain an action for goods sold and delivered, and money paid? An auctioneer is not a mere servant, but a special bailee, and has a sufficient property in goods which he is to sell, to maintain trover, and rebut a prosecution for felony.

As to multiplicity of action, the law equally abhors circuity of action, and will not admit trifling distinctions. If two actions were brought for the same cause against the same person, the court would interfere and relieve upon affidavit. Here only one action was brought. If a carrier has a commission to sell goods, he has a special property in them, and may maintain an action for goods sold and delivered. An auctioneer is upon the same footing, both being special bailees. It is the daily practice for auctioneers to bring actions of this kind, whether

(a) *Winchley v. Keeley*, *Term Rep. B. R.* vol. 1. p. 629.

1788. they are considered as agents only, or as selling in their own names. *Tatterfall* the auctioneer of horses has often brought actions against the buyer. So a merchant employed to sell the produce of an estate in the *West Indies*, though without a commission *del credere*, may, and often does, bring an action in his own right against a purchaser. An auctioneer has frequently been made defendant, and if he may be defendant, he may also be plaintiff. *Law v. Skinner*, 2 *Black.* 996. The plaintiff also is entitled to recover the money which he has wrongfully paid on a count for money had and received. *Moses v. Macfarlane*, 2 *Burr.* 1005. The authority cited from the *Term Reports*, B. R. 20. is not applicable to this case, here being an implied contract.

WILLIAMS
v
MILLING-
TON.

Adair replied, that the only question was, Whether a special property in goods was sufficient to support an action founded on a contract? He admitted, that in cases where an injury was done, an action on the *tort* might be maintained. He also admitted, that where the auctioneer was the only ostensible owner, there perhaps he might bring an action on the contract of sale; as in the case of the *West India* merchant, where the real owner was unknown. But in the present case, as the goods were sold on the premises of the owner, and as it was publicly declared, that they were his property, the plaintiff could not make a contract in his own name. The mode of sale made the whole difference. The case of *Simon v. Metivier* (a), is an authority to shew, that an auctioneer is only the channel through which the vendor contracts with the vendee, and that being an agent for both parties, he cannot have a sufficient interest in the goods to maintain this action.

LORD LOUGHBOROUGH—This case arises on circumstances which do not often happen, the defendant having practised a trick upon the plaintiff by driving off the goods in a cart, and at the same time holding out the money in sight, together with the paper containing a receipt for the debt due from *Crown* the owner. Though the defendant shall not be suffered to avail himself of such conduct, yet I entertain no sort of doubt on the general question, being extremely clear, that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference, whether the sale be on the pre-

(a) 3 *Burr.* 1921. more accurately reported in B. N. P. 280.

mises of the owner, or in a public auction room, for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest: but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay. In the common course of auctions, there is no delivery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risque. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompence of a commission *del credere*. It is not a true position, that two persons cannot bring separate actions for the same cause: the carrier and the owner of the goods may each bring actions on a *tort*; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion, that this action may well be maintained.

GOULD, J.—I have listened attentively to what has been delivered by my Lord Chief Justice, and have no doubt but that the law is precisely as he has stated; I shall therefore only say, that I entirely agree with him in opinion.

HEATH, J.—I am of the same opinion. It is the same thing, whether goods be sold on the premises of the owner, or in an auction room; the possession is in the auctioneer, and it is he who makes the contract; if they should be stolen, he might maintain trespass, or an indictment for larceny: he therefore has a special property in them, which is all that is necessary to support this action. It was said, that the case of *Simon v. Metivier* proved, that an auctioneer was only the channel through which the contract was made between the buyer and seller; but this must be taken *secundum subjectam materiam*; though he is an agent to some purposes, he is not so to all: he is an agent for each party in different things, but not in the same thing: when he prescribes the rules of bidding, and the terms of the sale, he is the agent for the seller; but when he puts down the name of buyer, he is agent for him only. Here the deposit was to be paid to the auctioneer, who had a sufficient property to maintain this action.

WILSON, J.—I am inclined to think this verdict properly found, though I am by no means so clear as my brothers; I should there-

1788. therefore have wished to give it further consideration. I think the verdict right, because the defendant having contracted with the plaintiff for the goods, shall not be permitted to say that the plaintiff had no right to contract: having the benefit, property and possession of them, it shall not lie in his mouth to dispute the validity of the contract: he who claims under the plaintiff shall not say, "I will not pay, because you had no property in the thing sold." Without doubt the right of *Crown* was superior to that of the plaintiff: how far he might be preferred to the plaintiff in bringing the action, or how far a notice from him to the buyer not to pay, would prevent the auctioneer from maintaining this action, might be fit to be considered. But the defendant had no right to put any owner forward, in order to prevent the auctioneer from having this remedy. It struck me as material that the goods were sold on the premises of the owner, and in his name; as if it were with *him* that the contract was made. In the North of *England*, where cattle are often sold by auction, it would be thought a strange thing if the auctioneer could maintain such an action as this: there he is employed merely to sell cattle on the premises, and is not considered as having any sort of interest in them. Where indeed the auctioneer has rooms for the purpose of selling, he is answerable to the owner, and has a special property. The plaintiff also, in the present case, might have had a special property, but I rather doubt whether that would give him a right to dispose of the absolute property, upon which the action for goods sold and delivered is founded. I therefore think the verdict right, inasmuch as the party who has gained possession of the goods, shall be estopped from saying, to avoid a just payment, that there was no property in him from whom that possession was derived. Another circumstance also, in favor of the plaintiff is, that every part of the declaration is proved. Property is not stated to be in him, because it is implied by law, but only that the goods were sold and delivered by him to the defendant; this is proved, and affords a strong reason why the defendant should not be permitted to dispute the effect of the sale and delivery.

Rule discharged.

1788.

TOWES v. POWEL & UX.

IN *Michaelmas* vacation, 1787, a *capias ad resp.* was issued in this cause, returnable on the *Octave of St. Hilary*, to which the defendants appeared. On the last day of *Easter* term, the plaintiff obtained a rule for time to declare, until the first day of *Trinity* term; and then a rule for further time till the last day of *Trinity* term; but not having declared in that term, the defendant, in the vacation, signed judgment of *non-pros*: as of *Trinity* term.

Runnington, Serjt. obtained a rule to shew cause why this judgment should not be set aside, the defendant not having given a rule to declare.

Against which, *Le Blanc*, Serjt. urged, that the judgment was regular;

1st, Because by a rule of court, of *Hilary* term in the 9th of *Anne* (a), where the plaintiff does not declare within two terms after the return of the writ, the defendant must sign judgment of *non-pros* in the vacation after the second term; he cannot wait therefore till the next term.

2dly, Though where further time has not been granted, a rule to declare is necessary to be given previous to signing judgment, yet where such time has been granted, there a rule to declare is not necessary. The plaintiff having himself obtained time, is presumed to know when he ought to declare, without notice from the defendant. On the same principle, where a defendant has had time to plead, and has neglected so to do, the plaintiff may sign judgment without giving him a rule to plead. *Starkie v. Wilkes*, 1 *Crompt. Prac.* 166.

Runnington in support of the rule. At the end of the second term the plaintiff may, of course, have a rule for farther time from the secondaries; but if a rule be given by the defendant to declare, a summons may be taken out before a judge, who will grant farther time at his discretion. Where the defendant does not give a rule to declare, the plaintiff has, till the *essoign-day* of the third term, to deliver or file his declaration. *Prac. Reg. C. B.* 121. The reason why a rule to plead is not necessary for a defendant, who has obtained time, is, because by so doing he admits himself to be in court.

(a) See Rules, Orders, and Notices of the Court of Common Pleas, fol. edit. 1742.

Monday,
Nov. 24th.
Where the plaintiff does not declare, after having obtained time for that purpose, the defendant may sign judgment of *non-pros* without giving a rule to declare.

1788.

TOWERS
v.
POWELL.

Per curiam.—The plaintiff having himself obtained time to declare, has no right to call upon the defendant for notice. Where time to plead has been given, no rule to plead is necessary, and the case of declaring, bears in this respect a strict analogy to that of pleading.

Rule discharged (a).

(a) So if plaintiff take out a rule for time to declare against one of two defendants without proceeding against the other, the latter may sign judgment of *non-pros* immediately. 2 Term Rep. B. R. 258. n.

Tuesday,
Nov. 27th.

BACON v. SEARLES.

The indorsee of a bill of exchange having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. Where the drawer pays the whole, the acceptor is entirely discharged.

ASSUMPSIT by the indorsee of a bill of exchange against the acceptor,

The bill was drawn for 95*l.* 10*s.* by one *Seymour* on the defendant, payable to his own order, by him indorsed to the plaintiff, and accepted by the defendant. After it became due, *Seymour* the drawer paid the plaintiff 60*l.* 10*s.* as part of the contents; the defendant paid the residue, with interest, into court, and pleaded the general issue.

This cause was tried before Lord *Loughborough* at *Guildhall*, at the sittings in the present term, and a verdict found for the defendant, with leave to move the court to enter a verdict for the plaintiff.

This motion was accordingly made by *Bond*, Serjt. who contended, that the payment by the drawer was not a discharge of the acceptor, he having, by his acceptance, made himself liable to the holder of the bill. The contract between the indorser of a bill and the indorsee was, he argued, totally different from that between the drawer and acceptor; the former being merely a contract of indemnity, but the latter an undertaking that the acceptor has effects of the drawer in his hands to the amount of his acceptance, by which he gives currency to the bill, and makes himself liable for the whole. *Parminster v. Symons*, 4 *Brown's Parl. Cas.* 604. 1 *Wils.* 185. The payment of the drawer, in the present case, gave him a lien on the bill for the sum he had paid; the holder also had a lien for the whole amount; but as a personal contract cannot be severed, and made the ground of two actions; the holder must bring the action for the whole, and be considered as a trustee for that part

part which the drawer had paid. *Johnson v. Kennion*, 2 *Willf.* 1788.
262. *Hawkins v. Cardy*, *Lord Raym.* 360.

WILSON, J. mentioned the case of *Beck v. Robley* (a), as being contrary to *Bond's* argument. BACON
v.
STANLEY.

LORD LOUGHBOROUGH.—When a bill of exchange is drawn, the drawer orders the acceptor to pay so much of his money to a third person; but if he anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking; so that if the acceptor were to pay the bill after notice given him that the drawer had already paid it, an action would lie for the drawer against the acceptor to recover back the money so paid. Another reason which weighs much with me is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if after a bill had been taken up by the drawer, the acceptor should be liable to be called upon for payment.

GOULD, J.—The doctrine contended for would go the length of proving, that the holder of a bill having received the whole money from the drawer, might recover it again from the acceptor.

(a) *BECK against ROBLEY*, Tr. 14 G. 3. B. R.

Indorsee of a bill of exchange against the acceptor. It appeared in evidence, that *Brown* drew a bill of exchange upon *Robley*, payable to *Hodgson* or order; which was accepted by *Robley*, and indorsed by *Hodgson*. Not being paid when due, *Hodgson* returned the bill, and *Brown* took it up, *Hodgson's* indorsement still remaining. *Brown* afterwards gave the bill to *Beck*, as a security for money, and when he gave it, acquainted *Beck* with the whole transaction, but did not tell him whether *Robley* had effects in his hands. Upon this evidence the jury found a verdict for the defendant, being of opinion, that the acceptor was discharged by *Brown's* taking up the bill, and that there was an end of its negotiability.

Mansfield moved for a new trial, on the ground that the jury had mistaken the law: He insisted, that the drawer of a bill, which in a course of circulation came back to his hands, might maintain an action as indorsee. (Mr. J. *Abbott* said he remembered several instances of such actions). And here the bill was indorsed to *Brown*, who might either have maintained his action as indorsee, or put it again in circulation, unless the acceptor's refusal to pay could prevent the negotiability of it, which certainly could not be the case.

Wallace, contra. A bill of exchange is payable at a given time, and is till that time negotiable. If payment is then refused, it goes back to the drawer, and when he has taken it up, there is an end of it. If it were otherwise, *Hodgson* would be liable, who certainly never meant that his name should give a title to the bill after it had been returned to the drawer.

LORD MANSFIELD—I first thought at the trial, that the action was maintainable, but am now clearly satisfied, that the jury did right. When a draft is given, payable to A. or order, the purpose is, that it shall be paid to A. or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable, *Hodgson* would be liable, for which there is no colour.

Rule for a new trial refused.

HEATH,

1788. HEATH, J. of the same opinion.

BACON
v.
SEARLES.

WILSON, J.—I had no doubt on this question, till the case of *Johnson v. Kennion* was cited; but that was done away by what has fallen from my lord. Indeed that case is inaccurately reported; and I am much disposed to think, that the Chief Justice never said what he is there stated to have said. That also might have been the case of a promissory note instead of a bill of exchange. But there my brother *Gould* says, that where the defendant had paid the amount of the bill, there was an end of the contract: so here, the drawer having paid part, and the acceptor the residue; the contract was at an end, the acceptor being the agent of the drawer. There also my brother *Gould* says, where the drawer of a bill has paid part, you may indorse it over for the residue. But that is for the protection of the indorsee. Here the plaintiff knew how much was due; no such special indorsement was necessary. The case then of *Johnson v. Kennion* does not influence the present; but even if it did, I shall think the justice of this cause much in favour of the defendant. The plaintiff has received all the money, and yet desires to be a trustee for the drawer, and receive again from the acceptor that which the drawer has paid. Besides, though the presumption is, that the acceptor of a bill of exchange has effects of the drawer in his hands at the time of the acceptance, yet in fact the effects are often sent after the acceptance.

Rule refused.

Friday,
Nov 28.

JENKINS v. TUCKER.

Where a husband goes abroad and leaves his wife, who dies in his absence, a third person who voluntarily pays the expences of her funeral (suitable to the rank and fortune of the husband)

though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be the father of the wife. *Quere*, Whether such third person can recover from the husband money which he has expended after the death of the wife in discharging debts which she had contracted in her husband's absence? *Quere* also, Whether the defendant can demur to the evidence, after having paid money into court?

for

for necessaries and funeral expences, with the common money counts. The defendant paid 100 *l.* into court, and pleaded *non assumpsit* as to the residue. 1788.

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At the trial, the evidence on the part of the plaintiff proved, that the defendant was possessed of a large estate in *Jamaica*; that he lived with his wife till he went thither; that he left her in bad health, and much in want of money; that after her death the plaintiff paid the debts which she had incurred in the absence of the defendant, and her funeral expences.

To this evidence the counsel for the defendant demurred.

In support of the demurrer, *Runnington*, Serjt. now contended, that a sufficient consideration was not disclosed by the evidence, to raise an *assumpsit*. A consideration, on which the law will imply an undertaking, must be either beneficial to the defendant, or detrimental to the plaintiff, 1 *Roll. Abr.* 24.; but in the present case there was neither one, nor the other: the plaintiff paid the money in question without either the knowledge or consent of the defendant, and therefore without his special instance and request. Request is a matter of proof on record. 3 *Lev.* 366. It is necessary to be alledged. *Dyer* 272. *Hunt v. Bate*. Payment of money for another without his consent and against his will is no ground for an *assumpsit*. 1 *Roll. Abr.* 11. *Hob.* 105. *Term Rep. B. R.* 20. If such an action were allowed, it would occasion a manifest injury to the defendant, as he would be precluded from contesting the legality of the original demand, and from the advantage of a set-off.

Generally speaking, *assumpsit* will not lie, except where debt will. Here debt could not be brought, there being neither privity nor a contract between the parties, *Hardr.* 485.; where the Chief Baron said, that if there be a mere collateral engagement, debt would not lie. This was a collateral obligation, that could not be supported without a special request being proved. If it were otherwise, the greatest inconveniencies would arise. In the present instance the husband would be liable for the debts of the wife beyond what were for necessaries. Though in some particular cases the law will raise an *assumpsit* where a man is under an obligation of conscience or equity to pay the sum demanded, yet in this case the defendant was neither bound in conscience, nor equity, to repay money laid out on his account, without either his consent, knowledge, or request.

1788. *Rooke, Serjt. contra.* The court will not presume that the money in question was paid without the consent of the defendant, because it does not appear to have been paid expressly at his request. It is possible that a previous consent might have been given. This was a matter for the discretion of the jury, who would have determined by a verdict, whether there was a sufficient consideration. The rule, that such a consideration as will raise an *assumpsit* must be either beneficial to the defendant or detrimental to the plaintiff, has been often holden to be too narrow. *Cowp. 290. Hawkes v. Saunders.* But allowing this rule to be in full force, this case comes within the meaning of it, for it was a benefit to the defendant to have his father in law his sole creditor, in the room of many others; and it was also a detriment to the plaintiff to have advanced so much money.

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This was not the interference of a stranger, but of a father, whom common decency required to relieve the distresses of his daughter, and give direction for her funeral, in the absence of her husband. There appears then a sufficient consideration on the record to maintain this action. But besides this, the defendant, by paying money into court, acknowledges that the action was well brought; he pays it in full discharge, and therefore confesses a ground of action on every count of the declaration. 1 *Term Rep. B. R. 464. Cox v. Parry.*

The cause of action therefore being admitted, a demurrer to evidence could not be supported, and the jury ought not to have been prevented from ascertaining the *quantum* of damages.

Runninton in reply. This is an abstract question of law, whether or not there appears a sufficient consideration on the record? As to presuming that the defendant gave a previous consent to the plaintiff, there is no reason to warrant such a presumption. Admitting that decency required the plaintiff to direct the funeral, yet the charges made were greater than were necessary. But if the plaintiff has a right in law to recover, the sum cannot be apportioned, and he must recover the whole. Though the case of *Hawkes v. Saunders* be good law, it does not affect the present, as in that there was both consent and an equitable consideration, which are wanting in this. As to payment of money into court, it does not admit a right of action to the extent contended for, but only for so much as is really paid in. The practice of paying money into court arose from

from the court's permitting on equitable grounds, the defendant, after the action was commenced, to have the advantage of a plea of tender when he was too late in fact to plead it. If the plaintiff takes the money out of court, he is entitled so far to costs; but if he proceeds, it is at his peril, and beyond this he is subject to strict legal proof. The case of *Cox v. Parry* is in favour of the defendant: the words of Mr. Justice *Ashburst* in delivering the opinion of the court in that case are, "as the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action to the amount of that sum, but he has admitted nothing more."

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Lord LOUGHBOROUGH—This demurrer to evidence strikes me as being extremely absurd, since by payment of money into court, the defendant admits a cause of action, (so that where money is paid into court, there can be no such thing as a non-suit); and also, because it was for the jury to determine the quantum of damages. The court cannot anticipate the province of a jury, and ascertain damages on a writ of inquiry. It was not my intention, that any of the debts contracted by the defendant's wife, which the plaintiff discharged after her death, should have gone to the jury: but as the counsel for the defendant thought proper to demur to the evidence, the judgment on the demurrer must be general. They ought at the trial to have contended for a verdict; they seem to me to have taken the wrong method for their client.

I think there was a sufficient consideration to support this action for the funeral expences, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the plaintiff paid on this account, was paid to the use of the defendant. A father also seems to be the proper person to interfere, in giving directions for his daughter's funeral, in the absence of her husband. There are many cases of this sort, where a person having paid money, which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid: such as in the instance of goods being distrained by the commissioners of the land-tax, if a neighbour should redeem the goods, and pay the tax for the owner, he might maintain an action for the money against the owner.

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GOULD, J.—It appears from this demurrer, that the defendant was possessed of a plantation in *Jamaica*, from the time he left his wife, till her death, which annually produced above 120 hogheads of sugar; the value of which, at a moderate estimation, amounted to near 3000 *l.* a-year. He was therefore bound to support her in a manner suitable to his degree; and the expences were such as were suitable to his degree and situation in life. The law takes notice of things suitable to the degree of the husband, in the paraphernalia of the wife, and in other respects. In the present case, the demurrer admits that the money was expended on account of the wife, and being for things suitable to the degree of the husband, the law raises a consideration, and implies a promise to pay it.

HEATH, J.—The defendant was clearly liable to pay the expences of his wife's funeral.

WILSON, J.—If the plaintiff in this case had declared as having himself buried the deceased, the husband clearly would have been liable; and as the case stands at present, the plaintiff having defrayed the expences of the funeral, the husband is in justice equally liable to repay those expences, and in him the law will imply an *assumpsit* for that purpose.

Judgment for the plaintiff. (a)

(a) The cause was tried a second time before Mr. Justice Heath, at the sittings after this term at Guildhall, who directed the jury to confine their attention to the funeral expences, and only to consider whether the 100 *l.* paid into court was sufficient to defray them; being of opinion, that the debts of the deceased, which the plaintiff had paid, could not be recovered, but allowing that point to be reserved for the further consideration of the court. The jury accordingly found a verdict only for the funeral expences; but it was for the whole amount of the undertaker's bill, 140 *l.* 15 *s.* The court was not afterwards moved on the subject of the debts.

Friday,
Nov. 28th.

LUSHINGTON v. WALLER.

Where judgment has not been entered within a year and a day, on a warrant of attorney given with a *post obit* bond, and the obligee does not apply to the court for leave to enter it, till after the death of the person on whose death it is payable, the court will not grant leave, without a rule to shew cause. A *post obit* bond is a security of a doubtful nature.

ADAIR Serjt. moved to enter up judgment on a warrant of attorney, on an affidavit stating that a bond for 1800 *l.* was given by the defendant to the plaintiff in the year 1780, conditioned for the payment of 900 *l.* (in consideration of 400 *l.* advanced at the time of the execution of it) on the death of the defendant's father, in case the defendant should survive, together

with

with the warrant ; that the father died in *September* last, and the son was still living. But

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The court said, that in common cases, where judgment has not been entered on a warrant of attorney within a year and a day from that date, it was necessary to apply to the court for leave to enter it ; as this was a *post obit* bond, a security of a questionable nature, which had been often disputed with success, leave to enter up judgment ought not to be granted without a rule to shew cause. If judgment is entered immediately on giving the warrant, or within a year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relation, the court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose, and will require him to give due notice of his intention.

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Adair, on hearing this opinion, took nothing by his motion.

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ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Twenty-ninth Year of the Reign of GEORGE III.

ROE, on the Demise of JORDAN, v. WARD.

Saturday,
Jan. 24th.

EJECTMENT for a messuage, &c. *John Jordan* was tenant for life, remainder to his son, the lessor of the plaintiff, for life; remainders over. *John Jordan*, the father, on the 22d of *June* 1785, made a lease of the premises by indenture, to the defendant, for 21 years, to commence from *Old Lady-day*, which was the 5th of *April* then last; on which day the defendant had entered. On the 30th of *September* 1785, *John Jordan*, the father died; on whose death the estate came to the lessor of the plaintiff, his son. The defendant continued in possession, and paid rent to the lessor of the plaintiff, after the death of his father, for two years together, on *Old Lady-day* and *Old Michaelmas-day*. Before *Old Michaelmas-day* 1787, the lessor of the plaintiff gave the defendant notice to quit on *Old Lady-day*, the 5th of *April* then next; and on his refusing to quit brought this action.

Tenant for life makes a lease for years, to commence on a certain day, and dies (before the expiration of the lease) in the middle of a year. The remainder-man receives rent from the lessee, (who continues in possession, but not under a fresh lease) for two years together, on the days of

payment mentioned in the lease. This is evidence, from which the court will presume an agreement between the remainder-man and the lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise: so that notice to quit ending on that day is proper.

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An objection was made at the trial, that the notice to quit on the 5th of *April* was bad; that it ought to have been on the 30th of *September*, the end of the year, dated from the death of *John Jordan*, the father; all the defendant's interest derived from the lease, having ceased on that event, as *John Jordan* the father, had no power to make a lease to endure beyond his own life.

Mr. Justice ASHHURST, who tried the cause, left it to the jury, whether they would not presume a new agreement between the lessor of the plaintiff and the defendant, that the defendant should continue to hold according to the terms of the original lease; as the lessor of the plaintiff had received rent from him during two years, after the death of *John Jordan*, the father, on the original days of payment, namely, *Old Michaelmas* and *Old Lady-day*; and if so, the notice to quit was proper. But a verdict was found for the defendant.

In *Trinity* term last, a rule was granted to shew cause, why this verdict should not be set aside, and a new trial granted.

Against which, *Lawrence*, Serjt. now shewed cause. He argued, that as the lease was made by a tenant for life, at his death all the interest of the lessee in the premises must cease: at that time, he was either a trespasser, or he still continued to be tenant. But he was clearly not a trespasser; and as there was no express agreement, as to the term for which he was to hold over, and as it is now a settled point of law, that there can be no such thing as a tenancy at will, he was tenant from year to year. If so, as during the tenancy for life of the father, there could be no contract implied between the lessor of the plaintiff and the defendant; the year must have commenced at the death of the father, namely, on the 30th of *September*, and on that day the notice to quit ought to have ended.

Le Blanc, Serjt. in support of the rule, contended, that though perhaps it might have been presumed, that the defendant's interest began from the 30th of *September*, if no rent had been paid on the 5th of *April*, yet as the rent was in fact paid on the 5th of *April* during two years, such a presumption was totally destroyed. If the interest of the defendant had, in truth, commenced on the 30th of *September*, on that day the rent would have been paid: but it appeared to be otherwise from the judge's report. The law draws a conclusion, that a tenant holds

holds from the day on which he pays rent. If the lessor of the plaintiff had given notice to quit on the 30th of *September*, he would have been nonsuited, since he would have been estopped, by having accepted rent on the 5th of *April* for two years together, from saying, that the defendant's term began on any other day. The defendant then ought also to be estopped, by his own act, having paid rent on the 5th of *April* during the same period of two years. The notice to quit therefore was regular, and the verdict wrong.

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LORD LOUGHBOROUGH.—The jury found a wrong verdict in this case. The notice to quit on the 5th of *April* was proper, as payment of the rent had been made on that day. It was also fair and just in the lessor of the plaintiff, to give the tenant notice to quit when his year ended, that the course of his husbandry might not be disturbed.

(a) HEATH, J.—The defendant was tenant at sufferance, on the death of the tenant for life; and the rent being paid on the 5th of *April*, was evidence of an agreement to hold from that day.

WILSON, J.—As there was no express agreement between the lessor of the plaintiff and the defendant, relating to the premises given in evidence, we must collect what their agreement was, from something done by them. The payment of rent by one, and the acceptance of it by the other, on the same day on which the defendant originally entered, was sufficient evidence of a relation back between them; and though the indenture itself was made on the 22d of *June*, it related back to the 5th of *April*. Although the title of the defendant, under the indenture, ended on the 30th of *September*, yet the payment of rent on the 5th of *April* was evidence of an agreement that he should continue to hold in the same manner as he did by the indenture; inasmuch, that if in the lease there had been covenants for particular modes of husbandry, and the defendant, after the death of the tenant for life, had neglected to perform them, the lessor of the plaintiff might have maintained an action on the case against him, stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease; of which agreement, the continuing to pay rent on

(s) *Mr. Justice Gould was absent.*

1789. the 5th of *April* for two years together, would have been good evidence.

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Rule absolute without costs (a).

(a) See 1 Term Rep. B. R. 159. *Right v. Darby* and another. [See also *Doe d. Martin v. Watts*, 7 Term Rep. B. R. 36. and *Doe d. Collins v. Weller*, id. 478.]

Tuesday,
Jan. 27th.

DUTENS CLERK v. ROBSON.

Where the subject of a suit in an inferior court is within the jurisdiction of that court; though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is going on to try such matter, a prohibition will not lie.

COCKELL, Serjt. moved for a rule to shew cause why a prohibition should not issue to the Consistory Court of the Bishop of *Durham*, in a suit for subtraction of tithes. The ground of his motion was, that the libel stated an *immemorial custom* and *prescription* for the rector to receive from the parishioners a composition for the tithe of milk. This he urged, being matter of common law cognizance, was improper to be discussed in an Ecclesiastical Court, and as it appeared on the face of the libel, afforded good ground for a prohibition.

But as the defendant had not, in his plea, denied the custom, the court refused to grant the prohibition. They said, that as the subject matter was within the jurisdiction of the Ecclesiastical Court, a prohibition would not lie, unless that court were proceeding to try the question of custom, but in this case, as the custom was not denied, it could not be put in issue.

Rule refused (a).

(a) [See *Carlsake v. Mapledoram*, that the court (of B. R.) will not grant a prohibition. 2 Term Rep. B. R. 473.] where the inferior court has cognizance of part of the charge, though not of the rest,

Wednesday,
Jan. 28th.

WORGMAN v. PLANK.

The notice to appear, annexed to common process, must contain the name of the defendant, on whom it is served.

THE defendant was served with a copy of a common *capias*, but his name was not mentioned in the notice to appear, which was "You are served, &c." leaving out the name. For this irregularity, *Lawrence*, Serjt. moved to quash the writ, as being contrary to the statute 5 Geo. 2. c. 27. s. 4. (a), and cited 1 *Wilf.* 104. (b)

No cause being shewn, the rule was made absolute.

(a) Which requires the notice to be "A. B. you are served, &c."

(b) *Bebema v. James*, in which the court of B. R. quashed a *latitat* for the same omission.

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PORZELIUS v. MADDOCKS.

THE plaintiff obtained a verdict at the sittings after *Easter* term: in *Trinity* term a new trial was granted; to which he not having proceeded,

Kerby, Serjt. now moved for judgment, as in case of a non-suit.

But the court held, that where a plaintiff had once proceeded to trial, judgment, as in case of a non-suit, could not be entered for not proceeding to a new trial; a subsequent neglect not being within the statute 14 *Geo.* 2. c. 17. (a) and therefore

Refused the rule.

(a) *Stat.* 1. Which enacts, "That where any issue is, or shall be joined, in any action, or suit at law, in any of his Majesty's courts of record, &c. and the plaintiff or plaintiffs in any such action or suit, hath, or have neglected, or shall neglect to bring such issue on to be tried, according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof) to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit, &c." The defendant should have carried the record down by proviso. See 3 *Term Rep. B. R.* 1. *Mewburn v. Langley*.

Wednesday, Jan. 28th.
Where a plaintiff has once proceeded to trial, judgment as in case of a nonsuit cannot be entered for not proceeding to a new trial.

THORNTON and another v. DUNPHY.

THE defendant was a prisoner in *B. R.*, to which he was removed by *Habeas Corpus*, after having been charged in execution in this court. In *Michaelmas* term last, (the next term after he was taken in execution,) he was brought up for his discharge under the statute 32 *Geo.* 2. c. 28. s. 13. (a) commonly called the Lords' Act; but upon cause shewn

Wednesday, Jan. 28th.
Where a prisoner has been brought into court to be discharged under the Lords' Act, and upon his examination the court have refused to discharge

him, they will not afterwards discharge him on that act, though he make an affidavit of circumstances in answer to the cause shewn, on his examination, against his discharge, and that those circumstances were not then disclosed, owing to a mistake. The 5th section of the 26 *Geo.* 3. c. 44. is only meant to remedy a neglect, in not taking the benefit of the Lords' Act, within the time limited by that act.

(a) Which enacts, "that if any person or persons shall be charged in execution for any sum or sums of money, not exceeding in the whole 100*l.* or on which execution or executions, there shall at any time remain due, as shall be made appear by oath, a sum or sums of money not amounting to above the said sum of 100*l.* and shall be minded to deliver up, to his, her, or their creditor or creditors, who shall so charge him, her, or them in execution, all his, her, or their estate and effects, for or towards the satisfaction of the debt or debts, wherewith he, she, or they shall so stand charged, it shall and may be lawful to and for any such prisoner, before the end of the first term which shall be next after any such prisoner shall be charged in execution by his creditor or creditors, to exhibit a petition to any court of law, from whence the process issued, upon which any such prisoner or prisoners was or were taken and charged

" in

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THORNTON
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the petition was rejected, and he was remanded. *Le Blanc*, Serjt. now moved to bring him into court a second time, and that the plaintiffs should again shew cause why he should not be discharged, on an affidavit containing some circumstances in answer to the cause before shewn by the plaintiffs, which, through mistake, as was stated, were not then disclosed. In support of this motion *Le Blanc* cited the (a) 5th section of the stat. 26 Geo. 3. c. 44. within the benefit of which, he said, the defendant came.

But the court, upon looking into the two statutes, were clearly of opinion, that the defendant did not come within the meaning of the 26 Geo. 3. c. 44. § 5. which was only designed to remedy a neglect in not taking the benefit of the 32 Geo. 2. c. 28. § 13. within the time limited by that act (b). In this case, the defendant had petitioned, and been brought into court, within the limited time, namely, before the end of the first term after he was taken in execution. There was no instance of a second petition being allowed, after the merits of the first had been finally decided. If such practice were suffered, it would produce infinite vexation.

Rule refused.

“ in execution, as aforesaid, or to the court into which any such prisoner or prisoners shall be removed by *habeas corpus*, or shall be charged in custody, and shall remain in the prison thereof;” (upon which, and on the terms there prescribed, the court shall make a rule to discharge the prisoner.)

(a) Which enacts, “ that where any debtor shall have neglected to take the benefit of the said act, (the 32 Geo. 2. c. 28.) within the time limited by the said act, and shall have remained in prison by the space of one year, and shall make it appear to the court, out of which such execution issued, that such neglect arose from ignorance or mistake, such debtor shall then be entitled to take the benefit of the said act, as if he or she had taken the same within the time by the said act so limited as aforesaid.”

(b) [But see *Pearce v. Taylor*, E. 31 G. 3. neglected to take advantage of the former where the court of K. B. held that the latter act through ignorance or mistake. 4 Term Rep. B. R. 231.]

Thursday,
Jan. 29th.

SECAR v. ATKINSON, Administratrix of ATKINSON.

In an action against an administrator, on promises of the intestate, an assumpsit with the administrator, as such, of money due from the intestate, does not make him personally liable.

ASSUMPSIT.—The declaration consisted of four counts.

The first, for goods sold and delivered to the intestate; second *quantum valebant*; third, money paid to the use of the intestate; fourth, that the plaintiff accounted with the defendant as administratrix, as aforesaid, of and concerning divers sums of money, &c. owing from the intestate to the plaintiff,

and upon that account the intestate was found in arrear and indebted to the plaintiff, &c. and being so found in arrear and indebted, she the said defendant, *as administratrix*, as aforesaid, in consideration thereof, promised; &c.—Plea, that the promises, &c. in the declaration, were made to the plaintiff and one *William Cox*, jointly, and a release from the said *William Cox*, &c.

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Replication, that they were made to the plaintiff solely, and not to him and *William Cox* jointly, &c.

Special demurrer, that the replication hath not expressly traversed, &c. the plea, &c.

Runnington, Serjt. gave up the demurrer, but took an exception to the declaration. He argued, that here was a misjoinder of action, 1 *Wils.* 248. 2 *Wils.* 231. 3 *Wils.* 348. and that the three first counts, being on the undertaking of the intestate, but the last, on that of the administratrix herself, the judgment on the former must be *de bonis testatoris*, and on the latter *de bonis propriis*, 9 *Co.* 91. *Gro. Eliz.* 91, & 406. 10 *Mod.* 70, & 254. *Cowp.* 284, & 289. But if there is not a misjoinder, yet the last count is not supported by a sufficient consideration to raise a personal undertaking, 1 *Vesey*, 125. and chiefly 1 *Ventr.* 268. which shews that the promise by the defendant should have been on request to account.

Cockell, Serjt. *contra*. The cases cited, are not applicable: an account stated raises no new debt, but is an acknowledgment of the old, 1 *Salk.* 208. *Elwes v. Mocatoe*. It is a sufficient consideration, that the intestate was indebted. This is not a personal promise, but made merely as administratrix. It is the usual practice to lay a promise from an administrator on an account stated, to take the case out of the statute of limitations. The judgment would be the same on all the counts, *viz. de bonis testatoris*. *Rann v. Hughes*, 7 *Brown Parl. Cas.* 550.

Runnington in reply. The anonymous case in *Ventris*, 268. was on an account stated by an executor, and the court held it sufficient to bind him personally. Here a request from the defendant to account is not stated. In the case cited from 1 *Salk.* 208. the action was brought by an executor, here it is against the administratrix.

On the next day, judgment was given by (a) *Heath*, J.—This is an action brought against an administratrix for a debt due from the intestate. The first count of the de-

(a) Lord Loughborough and Mr. Justice Gould being absent.

1789. *SECAR. v. ATKINSON.* declaration is for goods sold and delivered to the intestate, the second, is on a *quantum valebant*, the third for money paid to the intestate's use, and the fourth, on which the question arises, is on an account stated between the plaintiff and defendant, as administratrix, of money owing from the intestate, and in consideration of the intestate being found indebted, a promise is stated from the defendant to pay. To this declaration it has been objected, that there is a mis-joinder of action; that the judgment on the three former counts, must be *de bonis testatoris*, and on the latter, *de bonis propriis*, because in the last count the defendant is said to be charged in her own right. Unquestionably, if the judgment were to be, as it has been contended, in one instance *de bonis testatoris*, and in the other *de bonis propriis*, the declaration would be bad; but we are of opinion, that the objection is not founded in truth, and that the defendant is charged, as administratrix, on all the counts. The authority which my brother *Runnington* chiefly relied upon, was an anonymous case in *Ventris* (a) more correctly reported in 2 *Levinz* (b), by the name of *Hawes v. Smith*, which was a writ of error, on an action in this court, against an executor, in which the plaintiff declared on an account stated at the request of the defendant: the judgment was for the plaintiff *de bonis propriis*; and on error brought, this judgment was affirmed in the King's Bench, it being holden not to be error, because the plaintiff was *not bound* to account with the executor, and yet did account at the request of the executor; therefore a good consideration was raised. But it is very difficult to reconcile that case with any true principle of law. The plaintiff was bound in equity and conscience to account, the defendant might have had a writ of account against him, by the statute 31 *Ed. 3.* as appears from Lord *Coke's* Commentary on the statute of *Westminster* the second (c). It is also said in the case of *Hawes v. Smith*, that the promise was in consideration of forbearance to sue; but so far is it from being like forbearance to sue, that the defendant desires to account, and facilitates the bringing a suit by ascertaining the sum due. The principal case cited on behalf of the plaintiff, was that of *Elwes v. M'carter* (d); but that was on an *infirmul computassent* brought by an executor, and whether good law or not, does not affect

(a) 1 *Ventr.* 258.

(b) 122.

(c) 2 *Inst.* cap. 23. p. 404.(d) 1 *Salk.* 207.
the

the present case. It was also said, that the plaintiff did not account at the request of the defendant, and so there was no consideration for the promise; but it is expressly stated that they accounted together, and that the defendant promised as administratrix. This is the common mode of declaring against executors and administrators, to save the statute of limitations; but if it were to be considered as making them personally liable, I do not know who would ever take out administration.

Judgment for the plaintiff.

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ATKINSON.

JOHNSON v. SMITH.

Saturday,
Jan. 31st.

ON a former day *Kerby*, Serjt. moved to refer a charge made by the warden of the Fleet on a prisoner for fees, to the prothonotary, for examination. In answer, the court said, this was not like an attorney's bill, which the prothonotary might settle; but being a matter in which an officer of the court was concerned, was proper to be examined before the court itself. The reference, therefore, was not allowed; but a rule was granted to shew cause why the warden should not refund what appeared to be exorbitant. On shewing cause, it appeared that the charge on the prisoner was two guineas, for making, at his request, an expeditious return to a *habeas corpus*; that he knew the usual fee, and was informed of the additional one to be paid for expedition. It was urged by *Adair*, Serjt. (and by the warden himself, who was in court), that though the court might disapprove of such practice, and alter it in future, yet it would be hard to have a retrospect, and compel the warden to refund and pay costs, who had only followed the example of his predecessors in office. But the court said, whatever effect the prisoner's consent to pay might have between the warden and him, this was a question between the warden and the public. As the duty of an officer required him to make an expeditious return (a), he could have no pretensions to demand an additional fee for expedition. It was not to be endured, that advantages of this kind should be taken of the distress of persons under confinement.

The court will not refer a matter which concerns an officer of the court, to the prothonotary for examination. The warden of the Fleet cannot demand an additional fee for expedition, in returning a writ of *habeas corpus*.

Rule absolute with costs.

(a) Stat. 31 Car. 2. c. 2. s. 1.

1789.

Tuesday,
Feb. 3d.

PARQUOT v. ELING.

The court will not require a plaintiff to give security for costs, merely on account of his residence abroad. There must be special circumstances, to induce the court to require it.

ON a former day, *Adair*, Serjt. moved to stay proceedings, till the plaintiff, who was abroad, gave security to pay the costs, in case a verdict should be found against him. The court would not grant a rule, on the circumstance alone, of his being resident abroad (a), but required an affidavit of "his having gone thither to avoid payment of his debts, of his insolvency in a foreign country," or the like, saying that the practice was now settled in this court, that the plaintiff should not be compelled to give such security, merely because he was in another country.

An affidavit of this sort being now produced, a rule was granted to shew cause, which was afterwards made absolute, no cause being shewn.

(a) This practice differs from that of *B. R.* where a security for costs is required from the plaintiff, without any other ground than that of his being in a foreign country, 1 *Term Rep. B. R.* 267. the same, if he be in *Ireland*. *Ibid.* 362.—[*But see post* vol. 2. p. 118. and p. 384. note (b).]

Tuesday,
Feb. 3d.

PORRIER v. CARTER.

The court will not require the plaintiff to give security for costs either on account of his being a foreigner, or insolvent; if he reside in *England*.

BOND, Serjt. moved to stay proceedings till the plaintiff gave security for costs, on an affidavit, stating, "that he was a foreigner, had left *France* to avoid being arrested for debt, and was in *England* insolvent." But the court refused the rule, saying, that neither the plaintiff's being a foreigner, nor his insolvency in this country, were sufficient reasons to require such a security.

Tuesday,
Feb. 3d.

ROGERS v. MAPLEBACK.

Notice of justification of bail, is not such a waiver of the default of not giving notice of exception, as to support a rule on the sheriff to bring in the body; though it is a waiver as between the plaintiff and defendant.

BOND, Serjt. moved to discharge a rule on the sheriff to bring in the body, on an affidavit, stating, "that the defendant had put in bail, and, upon searching the office, no exception was found to have been made."

as to support a rule on the sheriff to bring in the body; though it is a waiver as between the plaintiff and defendant.

Runnington, Serjt. shewed for cause, that notice of justification had been given by the defendant, which, he contended, was a waiver of the necessity of notice of exception; and cited a rule of this court, 12th of *May* 1784 (a), in which it was settled, that when a rule to bring in the body had been served, bail must not only be put in, but justified, though the defendant be rendered. He also said, that this was analogous to the case of delivering a declaration in chief, in a bailable action, before bail were put in, which, on all hands, was agreed to be a waiver of the necessity of putting in bail. But

The court held, that although there was a waiver, as between the parties, yet the irregularity was not cured, as respecting the sheriff, according to the principle of the case of (b) *Cohn v. Davis* decided last term; and therefore made the rule, for the discharge of the former rule, absolute, with costs.

(a) *Impey's New Instructor Clericalis*, C. B. 2d edit. 155.

(b) *Ante*, So.

BARNARD v. MOSS.

Wednesday,
Feb. 4th.

THIS was an action of debt on the stat. 2 & 3 *Ed. 6. c. 13.* to recover treble the value of tithes not set out: there was also a count for the single value.

The defendant demurred to the declaration; but the parties afterwards agreed to submit to arbitration, and judgment was entered to stand as a security for costs. The arbitrator determined the single value of the tithes to be 6*l.* 7*s.* 6*d.*, and awarded treble that sum to the plaintiff, viz. 19*l.* 2*s.* 6*d.*, together with the costs of the reference, and that he might sue out execution.

Lawrence, Serjt. now moved, that the prothonotary might tax the costs of suit to the plaintiff, grounding his motion on the stat. 8 & 9 *W. 3. c. 11. s. 3.* which enacts, "that in all actions of debt upon the statute for not setting forth of tithes, wherein the single value or damages found by the jury, shall not exceed the sum of 20 nobles (6*l.* 13*s.* 4*d.*) the plaintiff obtaining judgment, or an award of execution, after plea pleaded, or demurrer joined, shall likewise recover his costs of suit."

namely, under the stat. 8 & 9 *W. 3. c. 11. s. 5.* the value not having been found by a jury; but the court will allow him to have the costs taxed, on the count for the single value.

In an action of debt for the penalty of the stat. 2 & 3 *Ed. 6. c. 13.* for not setting out tithes, with a count in the declaration for the single value; after a demurrer to the declaration, the parties submit to arbitration, and the arbitrator awards the single value to be less than 20 nobles, (6*l.* 13*s.* 4*d.*) The plaintiff is not entitled to costs on the counts for the penalty.

Cockell,

1789. *Cockell*, Serjt. opposed the motion, contending that the plaintiff was not entitled to costs of suit, unless the single value of damages had been found by a jury, the words of the statute being positive; and cited the case of *Biddulph v. Cooper*, in this court, Hil. 23 Geo. 3. which was an action for not setting out tithes, on the stat. 2 & 3 Ed. 6. c. 13; the plaintiff declared for less than 20 nobles, and signed judgment for want of a plea; after which he applied to the prothonotaries to tax his costs. They consulted Mr. Justice Gould, who informed them, that as no trial or inquisition was had by a jury, the plaintiff was not entitled to costs.

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Lawrence replied, that the case of *Biddulph v. Cooper* could only be in point, if on the demurrer, final judgment had been here given for the plaintiff. but the reference to the arbitrator, was like an application to the court for leave to go trial after a demurrer, the arbitrator being substituted in the place of a jury. At all events the plaintiff was entitled to his costs on the count for the single value.

The court held, that the statute was confined to the case of the single value or damages being found by a jury, and therefore refused the rule, as far as it respected the counts for the penalty, but allowed the costs to be taxed on the count for the single value.

Wednesday,
Feb. 4th.

ROSE, and MERCY, his Wife, v. BOWLER and READ,
Executors of BOWLER.

Where the cause of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a *nolle prosequi* as to some, and leave the others remaining.

An executor cannot be charged as such either for money had and received by him, money lent to him, or on an account stated of money due from him as such; those charges making him personally liable.— The wife can only join with the husband in bringing an action, where she is the meritorious cause of action, as where a legacy is left to her.— Q^y. Whether an executor can be sued as such, for a legacy left by the testator?

cutors to the use of the plaintiffs, &c.; 3d. money lent to them *as executors* by the plaintiffs; 4th, an account stated of money due from them *as executors*, to the plaintiffs, and as such a promise, &c.

1789.

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v.
BOWLER.

Special demurrer, that the plaintiffs had declared against the defendants *as executors*, whereas they ought to have been declared against in their own right; that the plaintiffs had declared against the defendants, on debts and promises, &c. as having respectively accrued, and been made by them *as executors*, whereas such debts and promises could not by law accrue, or be made, in that capacity, but *personally only*; and that there was a misjoinder of action, in this, that some of the causes of action accrued to the plaintiffs jointly, and others to the husband alone, &c.

Nolle prosequi as to the three last counts, and joinder in demurrer to the first, &c.

On the part of the defendants, *Marshall*, Serjt. began, by making three objections to the first count. 1. That an action at common law would not lie for a legacy. 2. If such an action would lie, the husband and wife could not join in it. 3. That the defendants could not be sued as executors in such action. As to the first point, although the modern cases determined in *B. R. Cowp.* 284 & 289. are authorities to prove that this action will lie, yet those decisions are contrary to the antient authorities. *Dyer* 264. pl. 41. *Sir Tho. Raym.* 23. 11 *Mod.* 145.—1 *Salk.* 315.—*Moore*, 917. But if an action at common law will lie for a legacy, yet as this legacy became due during the coverture, it was vested in the husband, and he alone could sue for it. The husband and wife ought to join in all actions to recover a chose in action, due to the wife before coverture, as a debt on bond, for rent, and the like: they ought also to join in actions which arise during the coverture, if such actions would survive to the wife; but where the wife cannot have the action if she survive, the husband must sue alone. Where the wife before marriage is entitled to a chose in action, the marriage does not vest it in the husband, unless reduced into possession; but where a chose in action is given to the wife during the coverture, it vests absolutely in the husband. 1 *Com. Dig. tit. Baron & Feme*, p. 555. 3 *Lev.* 403.—1 *Mod.* 179. A legacy left to the wife during the coverture does not survive to her. 2 *Rol. Rep.* 134.

But whether the plaintiffs could join in this action or not, the defendants cannot be sued as executors. An executor
cannot

CASES IN HILARY TERM

cannot be sued as such, where he may be sued in his own right, because there are different judgments, affecting different funds. The representative of the testator cannot be sued on any contract, which the testator did not make; wherever therefore, an executor is sued on a contract made by himself, he must be sued in his own right, though it relate to the concerns of the testator. Here the testator made no contract to give the legacy; he could not be liable in his lifetime to an action for it; both the consideration and the promise were personal in the executors, *King v. Thom*, 1 Term Rep. B. R. 487. The law will not allow an action to be maintained against any person, who cannot plead the proper pleas belonging to such an action: here the defendants could not plead *plene administraverunt*, 1 Term Rep. B. R. 691.

The three last counts are bad, because the husband and wife cannot join in an action, on any of the promises contained in them, nor the defendants be sued as executors on those promises, neither can those counts be joined with the first, supposing the first to be good against the defendants as executors. Of this the plaintiffs were sensible, and entered a *nolle prosequi*. But a *nolle prosequi* is not to be allowed in this stage of the proceedings, to prevent the operation of the demurrer. The ground of a demurrer may be, an union of incongruous matter, on which the court could not give a proper judgment. But if the objectionable parts be withdrawn by a *nolle prosequi*, the demurrer has nothing to act upon, for though it was proper when put in, it is rendered nugatory by an act of the party, whose fault made it at first necessary; part of the plaintiff's allegation remains unanswered, and the defendants are put to an useless expence. If this may be done, why do parties ever move to amend? Why is not a *nolle prosequi* entered on the whole declaration? But even supposing that a *nolle prosequi* may be entered, as in this case, yet it is here irregular, being by attorney, and not by the defendants in person, *Beecher's Case*, 8 Co. 58. *Cro. Jac.* 211.

But the husband and wife cannot join, in the three last counts because if the defendants have received money to the use of the plaintiffs, the husband alone is entitled to it. A feme covert cannot assent to a statement of accounts, but as the servant of the husband, and then it is his contract. 2 Black. 872. 1 Term Rep. B. R. 40. Neither can the action be maintained agai

the defendants as executors on these last promises. 1 *Term Rep.* 1789.
B. R. 487. *suprà*. Either the first count charges them in a wrong
 character, or if they are there rightly charged as executors,
 that count is mis-joined with the other three, on which the
 judgment must be *de bonis propriis*. In every point of view,
 therefore, the declaration is bad.

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Le Blanc, Serjt. on behalf of the plaintiffs, argued that at
 any period a party might withdraw any part of the pleadings,
 leaving enough to support his action, for which one cause was
 sufficient. The defendant may withdraw such of his pleas as
 are ill-founded, provided he leaves one plea good, and the
 court will not compel him to go on to an erroneous judgment.
 So where the parties go to trial, after verdict, damages may be
 severed, the judgment entered on such counts as are good, and
 a *remittitur* for the bad ones, on payment of costs. Where a
nolle prosequi is entered, after joinder in demurrer, it is optional
 in the defendant, either to proceed, or withdraw his demurrer,
 which he may do of course without leave of the court, and be
 entitled to the costs of the demurrer: but if after notice of a
nolle prosequi, he does not plead over, he goes on voluntarily
 with the demurrer. As to the *nolle prosequi* being entered by
 attorney, unless it be so expressed, the court will not presume
 it: in the case in *Croke James*, it was expressly said to be by
 attorney. As to the other objections, *Lord Mansfield* says, in
Atkins v. Hill, that the defendant had, by his demurrer, ad-
 mitted, that he had sufficient to pay the legacy, so here there is
 the same admission by the demurrer. Where an executor
 promises, in consideration of assets, a court of law will compel
 the performance. *Atkins v. Hill*, *Cowp.* 284. *Hawkes v.*
Saunders, *Cowp.* 289. (a). *Lewis v. Lewis*, tried at *Nisi Prius*,
 before

(a) *Lewis v. Lewis* administrator, with the will annexed. *Sittings at Westminster*
 after *Trin.* term 1778.

The declaration stated that one *Thomas Lewis* made his will, and afterwards a first,
 and a second codicil, and by his second codicil gave to the plaintiff 400 guineas to be paid
 out of his *India* bonds. That the testator died, and administration with the will
 and codicils annexed, was granted to the defendant. That the testator was possessed of
India bonds to the amount of 3000*l.* and of goods and chattels to a large value; all
 which *India* bonds and goods and chattels came to the hands of the defendant, and were
 sufficient to satisfy all the testator's debts and legacies; that the defendant might have
 paid the plaintiff his legacy out of the said bonds, and by reason of the premises became
 liable, as administrator, to pay, and being so liable, promised, as administrator, to pay the
 legacy.

Plea

1789. before *Lord Mansfield*, at the sittings after *Trinity* term 1778.

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The next objection is, that the husband and wife could not jointly sue. But where an action would survive to the wife, there she must join with her husband. Here the legacy would survive to the wife, not having been reduced into possession by the husband. If the husband had died, she might have claimed it, and not his representatives. The last objection is equally without foundation, namely, that executors can only be sued as such, on contracts made by the testator. They are liable, as executors, for funeral expences, which are to be paid before debts or legacies. Though the legacy in question was not a debt in the testator's lifetime, yet it was a charge made by him on his effects. This was a qualified promise by the defendants, to pay out of assets in their hands, which is admitted by the demurrer. It is objected, that they promised as executors, and therefore could not be sued in their own right. The case of *King v. Thom* shews that executors may sue as such, on a contract made after the death of the testator, where the money would be part of the assets; by parity of reason executors may be sued as such, where the money, if recovered, would be deducted from the assets. *Rann v. Hughes*. 7 *Brown Parl. Caf.* 550, proves that though an executor be charged personally for a debt of the testator, yet judgment will be *de bonis testatoris*.

Marsbal in reply. There is no instance of a demurrer being withdrawn, and the party entitled to his costs, as a thing of course, after a *nolle prosequi*. The *nolle prosequi* was clearly entered by attorney. A warrant of attorney being placed at the beginning of the record, the parties are in court by attorney in all the subsequent pleadings, except in pleading in abatement, when it is expressed that the party pleads in his own proper person,

Plea non assumpsit.

The cause was tried at the sittings after *Trinity* term 1778, at *Westminster*, before *Lord Mansfield*. The plaintiff proved the will, codicils, administration, and *India* bonds sufficient, and that the defendant had offered to pay the plaintiff his legacy, if he would deduct 100 *l.* which he pretended to be due from the plaintiff to the testator; but which the plaintiff denied, and refused to deduct. *Lord Mansfield* directed the jury to find a verdict for the plaintiff for 420 *l.* with leave to move the court for a new trial; and said, if there was not an absolute promise here to pay the legacy, there was at least strong evidence of the defendant's assent to it.

But the defendant submitted, and never brought the cause before the court (a).

(a) [It is now decided that no action can be maintained at law to enforce payment of a legacy; the court of Chan- cery being the proper jurisdiction for that purpose. *Deeks v. Strutt*, 5 Term Rep. B. R. 690.]

otherwise

otherwise it is error. As to funeral expences, decency requires them to have a priority. A man cannot be charged for a legacy bequeathed by him during his lifetime, any more than he can have an heir in his lifetime, the original cause, therefore, is not in him.

WILSON, J. observed,—That in the cases cited of *Atkins v. Hill*, and *Hawkes v. Saunders*, the question was, whether executors had made themselves personally liable, in which an averment of assets was necessary. But here the principal question was, whether, by the general common law, an executor, *as such*, was liable to be sued for a legacy? in which case it would be surplage to alledge assets, and the defendant might plead *plene administravit*. This he said, being a question of great importance, and as yet undecided, and only (a) two judges able to attend, they meant to give judgment on the other points of the cause, according as they should find them upon consideration.

On this day, HEATH, J. gave judgment as follows:

This is an action of *assumpsit*, brought by husband and wife against executors for a legacy, bequeathed by the testator to the wife. The first count states, that the defendants were liable, as executors, to pay the legacy, and that being so liable they promised, as executors, to pay it. The second count is for money had and received by the defendants, as executors, to the plaintiffs' use. The third, is for money lent to them, as executors, by the plaintiffs; and the fourth is on an account stated between them. To this declaration there is a demurrer, the causes of which are, that the defendants are sued as executors, and not in their own right, and that there is a mis-joinder of action, some of the causes of action accruing to the plaintiffs jointly, and others to the husband alone. The plaintiffs have entered a *nolle prosequi* as to the three last counts, and joined in demurrer. But there is no case to prove that, in this stage of the proceedings, a *nolle prosequi* can be entered; and, as it is certain, that no experiment of this kind has ever been made, it affords a strong argument that it cannot be made. It was contended at the bar, that there was an analogy between entering a *nolle prosequi* in this state of the pleadings, and severing of issues after a verdict; but here the objection is, that distinct and inconsistent rights of action are joined, for this cause there is a demurrer, and after joining in de-

(a) Lord Loughborough and Mr. Justice Gould were absent.

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murrer, there is no instance of the plaintiff being permitted to do away the ground of the demurrer, by separating the rights of action. On this point, therefore, we are of opinion against the plaintiff. The next objection is, that the husband is improperly joined with the wife. As to this, the rule is, that where the wife is the meritorious cause of action, there she may join with the husband, but not otherwise, as is evident from the authorities of *Croke James*, 644. (a), and 2 *Wilfort*, 414. (b) Now in the present case, though in the first count the legacy appears to have been left to the wife, yet there is no meritorious consideration on her part, for the three last promises, which are on general money counts. These counts are also such as would make the defendants personally liable, and with which they could not be charged as executors, and are therefore not to be joined with the first.

Here are then several counts, in one of which the husband is entitled in right of his wife, and on the others, in his own right, but he is joined with his wife in all; the defendants are also declared against as executors in every count; but the latter are such as can only make them personally liable. For these reasons, therefore, we give

Judgment for the defendants (c).

(a) *Abbot & Uz. v. Blisfeld.*

(b) *Weller and others v. Baker.*

(c) [See *Drummond v. Dorant*, *acc.* on the authority of this case, 4 Term Rep. B.R. 360.]

Saturday,
Feb. 7th.

JACKSON v. VERNON.

A., the owner of a ship, executes an absolute bill of sale of it to B., and by another deed of the same date assigns other property to B., which deed of assignment

THIS was an action for goods sold and delivered, in which a verdict was found for the plaintiff, subject to the opinion of the court; on the following case.

The plaintiff, who was a rope-maker, on the 7th of February 1787, and the 22d of July and 1st of August 1788, supplied the ship *Three Sisters* with cordage and stores, by order of one *Palmer*, the owner of her, without the knowledge of the defendant. On the 6th of February 1787, *Palmer* gave a bond to the defendant for 3000*l.*, conditioned for the payment of (reciting that the bill of sale was for the better securing a sum of money lent by B. to A. and also reciting a bond and warrant of attorney given by A. to B. to secure the same sum) declares that these "several deeds and instruments were made to enable B. by sale of all the things comprised in them, to raise the sum lent, without the concurrence of A., at any time before the money should be paid off;" but in the same deed there is a covenant, "That upon the payment of the money, B. shall re-convey to A., but so as not to prevent B. from selling, &c. at any time before the full payment, &c." Under these conveyances, B. is not absolute owner of the ship, but only mortgagee, and is not liable for necessities provided for the ship, before he takes possession.

1500*l.*

1500*l.* and a warrant of attorney to confess a judgment thereon, 1789.
 which was accordingly entered as of *Hilary* term 1787. On
 the same day, *Palmer* executed an *absolute* bill of sale of the
 ship to the defendant, in consideration of 1500*l.* paid by the
 defendant; and also a deed of assignment of various articles of
 personal property, and among them a policy of insurance on the
 ship, *towards payment and satisfaction of the sum of 1500*l.* that*
day lent and advanced to him by the defendant, which deed of
 assignment further recited, "That whereas to the intent and
 "purpose of *better securing* to the defendant, the said principal
 "sum of 1500*l.* and the interest thereof, *Palmer* had by deed
 "poll bearing date therewith *argained*, sold, assigned, convey-
 "ed, and assured to the defendant, the said ship or vessel, &c.
 "to hold to him, his executors, administrators, and assigns *ab-*
 "solutely; and the said *Palmer* had likewise entered into a bond
 "of equal date therewith, in the sum of 3000*l.*, conditioned
 "for the payment of 1500*l.* and interest, and had also, at the
 "same time, executed a warrant of attorney for better securing
 "the same; and then

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"That indenture further witnessed, and it was covenanted, &c.
 "that the said several deeds and instruments were so executed
 "by the said *Palmer*, for the purpose of enabling the defend-
 "ant, his heirs, executors, or administrators, *either by public sale*
 "or *private contract*, to sell and dispose of the several matters,
 "and things, therein *respectively comprised*, or other the effects
 "of the said *Palmer*, and thereby to raise and pay the said sum
 "of 1500*l.* so lent and advanced, &c. and the interest thereof,
 "without any farther or other concurrence of the said *Palmer*,
 "his heirs, executors, administrators, or assigns, or any of them,
 "at any time before the same should be paid off or discharged by the
 "said *Palmer*, his heirs, executors, or administrators."

But in this deed there was a covenant from the defendant to
Palmer,

"That in case *Palmer* should pay off and discharge the said
 "principal sum of 1500*l.* and interest, &c. before the said se-
 "veral matters and things should be sold or disposed of, for
 "the purposes aforesaid, that then, and in such case, the de-
 "fendant should and would re-convey and re-assign the said
 "several matters and things thereinbefore mentioned, in
 "such manner as the said *Palmer* should reasonably require.
 "And it was thereby also declared and agreed, that *nothing*

1789. " therein contained should prevent the defendant from selling and
 absolutely disposing of all and every the said premises, matters,
 JACKSON " and things thereon before mentioned, at any time previous to the
 v. " full payment of the said sum of 1500l. with interest, &c."
 VERNON.

On the 30th of July 1788, Palmer assigned the freight to the defendant.

On the 7th of August 1788, the defendant took possession of the ship, and received the freight due to the owner.

On the 22d of August 1788, the defendant sold the ship, and gave an indemnity to the purchaser, against all demands on her prior to that date.

The question for the opinion of the court was, Whether the defendant was liable to pay for the cordage and stores furnished by the plaintiff, subsequent to the bill of sale, and deed of assignment and defeasance, of the 6th of February 1787?

Cockell, Serjt. on behalf of the plaintiff. A tradesman who supplies a ship with necessaries, has a treble security. 1. The person of the master. 2. The ship itself. 3. The person of the owner; to either of which he may resort for payment. Here the defendant was complete owner, from the 6th of February 1787, at which time the bill of sale was executed. It was not necessary that the plaintiff should know, at the time of furnishing the stores, &c. who were the owners. He had given credit specifically to the ship, and generally to the owner, who was liable as soon as known, because all these materials being for the use of the ship, the owner must receive benefit from them. *Rich v. Cot*, Cowp. 636. *Farmer v. Davies*, 1 Term Rep. B. R. 108.

Bond, Serjt. on the part of the defendant, argued, that he was not owner, but only mortgagee of the ship, when the goods in question were furnished; the deed of defeasance making void the bill of sale, upon payment of the money owing. It is a rule of law, that a mortgagee, whether of goods or land, is not liable to debts or other incumbrances of the mortgagor, till he comes into possession. Here the defendant took possession of the ship for the first time, on the 7th of August 1788; and then only began to be liable as owner. So a mortgagee of lands out of possession, is not entitled to rent reserved in a beneficial lease. *Eaton v. Jaques*, Dougl. 438. and *Walker v. Reeves*, there cited. There is no substantial difference between a mortgage of real and of personal property; the only variation is in the mode of proceeding,
 in

in courts of law and equity. In both, the intent of the parties is consulted; as at law, the mortgagee may have possession, and a legal title till re-payment of the money, so in equity the mortgagor may redeem: though the ceremonies are different, the essence of the contract is the same: but as the mortgagee is not entitled to the profits before he is in possession, neither ought he to be liable to incumbrances, for "*Qui sentit commodum, sentire debet et onus*," (a) *Chinnery v. Blackburne*, B. R. Pasch.

24 Geo.

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VERNON.(a) *Chinnery v. Blackburne*, B. R. East. 24 Geo. 3.

General *indebitatus assumpsit* for freight of goods.—Plea general issue—Verdict for the plaintiff, subject to the opinion of the court, on a case, which stated, that by an indenture of assignment dated January 4, 1783, Robert Merryfield, in consideration of 1166 l. 18 s. which he owed to the plaintiff, assigned to her the ship *B. &c.* in which indenture there was a covenant from the plaintiff to re-assign the said ship, &c. to Merryfield, on payment of 1166 l. with lawful interest, on or before the 10th of November then next ensuing: that at the time of the execution of the deed, the ship was in the River Thames, and afterwards sailed to Portsmouth, and continued there till the middle of March following, in the possession, and under the command of A. B. and that the plaintiff did not then take possession: that Merryfield navigated, victualled, and manned the ship, as owner thereof, at his own expence, and risk, both from England to Antigua, and on her return from thence: that Merryfield, at Antigua, gave the command of her to captain Drysdale, and sent her to England, with orders to the captain, to address himself to Messrs. Dunlop of London, merchants, who were to sell her according to the directions contained in a letter, in which letter Merryfield also said, "Mrs. Chinnery has a demand against me, for near 1200 l. sterling, which I hope to remit shortly to you, or Mrs. Merryfield, so as to pay her;" that Messrs. Dunlop being applied to as consignees, lent two sums of 50 l. to captain Drysdale, declaring they should consider him as responsible, in case they should not receive the same by freight, &c. and that they afterwards received the money from Drysdale: that the ship completed the delivery of the cargo, on the 27th of September 1783; that the plaintiff took possession on the 29th September following, immediately on receiving information of her arrival in the Thames; that the defendant had goods from Antigua on board, the freight of which amounted to 76 l. 9 s. 11 d. for the recovery of which the action was brought: that captain Drysdale paid for lights, custom-house dues, and for clearing the ship, which the plaintiff repaid him, and also paid his and the mariners' wages, for the voyage from Antigua, to the amount of 234 l. 7 s. 7 d. after she took possession of the ship; and that the plaintiff afterwards sold the ship by auction for 710 l. &c.

Wood, for the plaintiff, contended, that she was the legal owner of the ship by virtue of the deed, and beneficial owner, having advanced more than the value. A mortgagee of a ship in possession may sue for freight accrued after the mortgage, as a mortgagee of land coming into possession is entitled to the intermediate rents, growing due after the mortgage, though before he takes possession. *Moss v. Gallimore*, Dougl. 266. Freight is as incident to the ownership of a vessel, as rent is to that of land; as the plaintiff pays all his expences, she is entitled to all gains. This is to be considered, as between mortgagor and mortgagee; though a set-off between the defendant and the mortgagor, or an attachment of the debt in London, might have made a difference, if they had existed.

Chambre, for the defendant—This is a contract by a third person, not for the benefit of the plaintiff, who cannot therefore recover in her own name. It bears no analogy to rent issuing out of land, which is incident to the reversion. The cause of action arises

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24 Geo. 3. Nor can the plaintiff charge the ship itself with this demand. Though by the civil law, necessities advanced for a ship, are a charge on the bottom, yet in our law it is otherwise, the credit being given to the personal security of the owners; except the ship be in a foreign port, in which case the captain is allowed to hypothecate, and the necessities advanced, create a lien on the ship itself, *Salk. 34. Justin v. Ballam, 2 P. Wms. 367. Watkinson v. Bernadiston (a).*

Cockell replied, that nothing had been adduced to shake the authority of *Rich v. Coe*, which was decisive on this point. He also urged, that the defendant was actual owner of the ship by virtue of the bill of sale, and had a right to sell immediately, not an interest becoming absolute at a future time: that the deed of defeasance was a distinct conveyance, and related to other property. But even if the defendant were only mortgagee by virtue of those deeds, yet he had reduced the mortgage into possession by having the freight assigned to him: he might also have recovered on the policy assigned to him, if a loss had happened.

HEATH, J.—(b). As we both agree in opinion on this question, and have no doubt, it would be wrong to put the parties to

on a personal contract, not on the ship itself. A mortgagee cannot recover rent received, from the mortgagor. Here the mortgagor has been in the enjoyment of the whole, and the cargo was delivered before the mortgagee had any claim. The mortgagee surely cannot bring actions against a vendee of the mortgagor for any supply of goods, &c. There could be here no set-off between the mortgagor and his creditors, if the mortgagee be permitted to bring this action. If the mortgagee takes the benefit of the contracts of the mortgagor, he ought also to be liable for any losses that might happen, which is not contended. If *Merryfield* had become a bankrupt, his assignees would have been entitled to the freight. The plaintiff paid the wages, &c. merely to get possession of the ship, discharged of any lien there might be upon it.

LORD MANSFIELD—The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee: but the mortgagor is no party, the action is brought after the mortgage, against a person who contracted with the mortgagor. This action must be founded on the idea, that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expenses, and he is to reap the profits.

ASHMURST, J.—If the voyage had proved unprofitable, could the mortgagor have recovered against the mortgagee the expence of the outfit? Yet this must have been the case if the mortgagee were entitled to the profits.

BULLER, J.—If the mortgagor be considered as agent, he must be so throughout, and then the mortgagee would be answerable for every loss, damage, &c. The payments by the plaintiff were voluntary, to get possession of the ship free from any liens, and are at most but evidence of the mortgagee's possession.

Posses to the defendant.

(a) See also *Wilkins v. Carmichael, Dougl. 101.*

(b) Lord Loughborough and Mr. Justice Gould, were both absent.

to the expence of a second argument. This is an action for goods sold and delivered for the use of the ship *Three Sisters*, and the question is, Whether the defendant be such an owner as is liable for the payment? *Palmer* on the 6th of *February*, 1787, executed a bill of sale to him, and on the same day another deed, reciting the bill of sale, with a defeasance.

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It has been argued that this is not a mortgage; but though it is not in the modern form, yet it is like an ancient mortgage by deed absolute, with another deed of defeasance; no day of payment and reconveyance is mentioned, because *Vernon* the defendant insisted on having a right to sell the ship when he pleased, on account of the insolvency of *Palmer*. From the nature therefore of the transaction, and the circumstances attending these deeds, the assignment of the ship to the defendant was in reality a mortgage.

Then the question is, Whether a mortgagee out of possession is answerable for goods furnished for the use of the ship? Now, though the owners are bound by the contracts of the captain, he being their agent, yet the mortgagee is not such an owner till he has possession. The case of *Rich v. Coe* is only applicable to the present, inasmuch as there *Harwood*, who had hired the ship, was not liable for necessaries, but was considered merely as the agent for the real owners. The cases of *Eaton v. Jaques*, *Walker v. Reeves*, and *Chinnery v. Blackburne*, are in point to shew, that the mortgagee out of possession, is not answerable for the contracts of the mortgagor.

WILSON, J. The only question is, Whether the conveyance to *Vernon* were absolute, or only by way of security? No one, I think, who reads these deeds, can have any doubt of its being a mere mortgage for a loan of money. Here is a bond for 3000*l.* conditioned for the payment of 1500*l.* lent by *Vernon* to *Palmer*; a warrant of attorney and judgment entered on it; then a conveyance of the ship by a bill of sale, in consideration of the same sum of 1500*l.* and as a farther security, a deed of assignment with a defeasance annexed. In this deed of assignment there is no covenant for a reconveyance, because as an additional security, *Vernon* the defendant stipulated for a power to sell the ship, at any time, without further leave from *Palmer*. It was understood by *Palmer* to be merely a pledge for the money due, as he contracted for freight, after the conveyance to *Vernon*; for if that conveyance had been absolute, he could not properly make a contract for freight. On the 7th of *August*, *Vernon* takes possession,

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possession, till which time, *Palmer* was the possessor, subject to *Vernon's* claim, who was not liable till he had actual possession. The owners of a ship are liable for furniture and necessaries, because they receive the immediate benefit of the freight, and it is for that reason the contracts of the captain are binding upon them, he being their agent or servant. But the cases which have established this to be law, do not affect a mortgagee not in possession, who cannot be considered as an owner, nor as such, entitled to the freight. The case of *Chinnery v. Blackburne* was decided on the ground, that as a mortgagee out of possession was not liable to the charges of the ship, so he was not entitled to the freight.

Postea to the defendant (a).

(a) [See *Wefferdell v. Dale*, 7 Term Rep. B. R. 306.]

Monday,
Feb. 9th.

FROST v. EYLES and JAKUES.

It is not necessary to add the name of the filazer to a common *capias*.

MOTION to set aside proceedings for irregularity, the name of the *Filazer* not being on a common *capias*. But the court held the proceedings regular, the addition of the *Filazer's* name not being necessary.

Rule discharged with costs.

Bond, Serjt. for the plaintiff, and *Adair*, Serjt. for the defendant.

Tuesday,
Feb. 10th.

ANDERSON v. HAYMAN.

A tradesman delivers goods to A. at the request and on the credit of B. who says, before the delivery, "I will be bound for the payment of the money as far as 800 l. or 1000 l." This promise of B. not being in writing, is void by the Statute of frauds, if it appear that credit was given to A. as well as B.

THE plaintiff was a woollen draper in *London*, and employed one *Biffin* as a rider, to receive orders from his customers in the country. The defendant meeting with *Biffin* at *Deal*, desired him to write to the plaintiff, requesting him to supply the defendant's son, (who traded to the *West Indies*), with whatever goods he might want, on his, the defendant's credit, and at the same time said, "Use my son well, charge him as low as possible, and I will be bound for the payment of the money as far as 800 l. or 1000 l." *Biffin* accordingly wrote to the plaintiff the following letter, "Mr. *Hayman* of this town says his son will call on you and leave orders, and he has promised me to see you paid, if it amounts to 1000 l.; Mr. *William Pitches* was also present as a witness."

"N. B.

“ *N. B.* If deal for 12 months credit, and pay in 6 or 8 months, 1789.
 “ expects discount in proportion.” Soon after the son received ———
 goods from the plaintiff to the amount of 800*l.*, which were de- ANDERSON
 livered to him in consequence of the abovementioned order v.
 from the father. The son was *debited* in the plaintiff’s books, HAYMAN.
 and being applied to for payment, wrote an answer to the plain-
 tiff as follows :

“ Your favor of the 27th past has been forwarded to me
 “ from *Ostend* by my clerk, in answer to which, I can only say,
 “ that I understood your credit for the goods was 12 months,
 “ which was also mentioned by your rider to my father, *I shall*
 “ at this rate, make you remittances for the different parcels as they
 “ come due, and remain, &c.

“ *Tho. Hayman, jun.*”

He afterwards became a bankrupt, and this action was brought
 against the father, to recover the value of the goods.

The declaration contained seven counts ; the first was on an
 agreement by the defendant to pay, &c. in consideration that
 the plaintiff would sell the goods to his son. 2d. *Quantum*
valebant. 3d. Goods sold and delivered to the son at the re-
 quest of the defendant. 4th. *Quantum meruit.* 5th. Money
 paid to the use of the defendant. 6th. Goods sold and delivered
 to the son, on a promise by the defendant, to see the plaintiff
 paid, to the amount of 800*l.* 7th. Same promise on a *quantum*
meruit.

Plea general issue. Mr. Justice *Heath*, who tried the cause,
 directed the jury to consider, whether the plaintiff gave credit to
 the defendant *alone*, or to him *together with his son* ; that in the
 former case, they should find a verdict for the plaintiff ; in the
 latter, for the defendant ; being of opinion, that if any credit
 was given to the son, the promise of the defendant, not being in
 writing, was void by the statute of frauds. A verdict was found
 for the defendant.

A rule was obtained to shew cause, why this verdict should
 not be set aside, and a new trial granted.

Against this rule, *Bond*, Serjt. relied on the case of *Matson v.*
Wharam, 2 Term Rep. B. R. 80.

On behalf of the rule, *Le Blanc* and *Runnington*, Serjts. said
 that in *Matson v. Wharam*, the undertaking was collateral,
 but here it was direct, the original credit being given to the
 defendant ; and cited the cases of *Birkmyr v. Darnell*, 1 Salk. 27.

1789. and *Mowbrey v. Cunningham*, mentioned in *Jones v. Cowper*,
Cowp. 228.

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But the court were clearly of opinion, that this promise not being in writing, was void by the statute of frauds, as it appeared from the evidence of the letter of *Hayman* the younger, that credit was given to him, as well as to the defendant.

Rule discharged.

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Feb. 10th.

GRIFFIN v. EYLES, Warden of the Fleet.

An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued to retain the money in his hands, and that the court would be moved to set aside the judgment for irregularity; and notwithstanding a docquet has been struck against the client, becoming a bankrupt.

THE plaintiff having in *Michaelmas* term last recovered judgment against the defendant for 252*l.* 5*s.* 5*d.* in an action of debt for the escape of one *Jaques*, (a prisoner charged in execution at the suit of the plaintiff,) sued out a *fi. fa.* directed to the sheriff of *Surrey*, who made a levy, to that amount, on the defendant's goods. Soon after, the defendant gave notice to the sheriff, to retain the money levied, stating that he should make an application to the court to set aside the proceedings for irregularity. On the receipt of this notice, the sheriff refused to pay the money to the plaintiff's attorney, who demanded it. In consequence of which, the attorney obtained a rule to shew cause, why the sheriff should not pay to him the money in question, with interest, from the time it was levied, on an affidavit, which stated, amongst other things, that the whole sum was due to him for his bill of costs, as attorney for the plaintiff; viz. part for the debt, for which *Jaques* was taken in execution, (which was the amount of costs taxed in an action brought by *Jaques* against the present plaintiff in the Exchequer) and the remainder for the costs taxed in the action in this court against *Eyles* for the escape of *Jaques*.

Against the rule *Adair* and *Runnington*, Serjts. urged, that the sheriff had done right in retaining the money, because a docquet had been struck against the plaintiff, who after he recovered judgment, became a bankrupt.

Bond, Serjt. in support of the rule, relied on the cases of *Turwin v. Gibson*, 3 *Atk.* 720. and *Welch v. Hole*, *Dougl.* 226*.

On the authority of these cases, particularly of the last, the court, after consideration, made the

Rule absolute with costs,

leaving out that part which respected interest for the money; and said, that the circumstance of the docquet being struck, was immaterial.

*[238. edit.
 1790.]

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BAKER v. NEWMAN.

ON the third of *February* in this term, *Lawrence Serjt.* moved for a rule to shew cause, why judgment as in case of a nonsuit, should not be entered, on an affidavit, stating that issue was joined in *Michaelmas* term last, and that the plaintiff had not proceeded to trial. On a subsequent day, *Adair Serjt.* shewed for cause an affidavit on the part of the plaintiff, stating, that issue was in fact joined on the 7th of *December*, in *Michaelmas* vacation, and that a note dated the 25th of *January* had been sent to the defendant's attorney, purporting that the plaintiff could not proceed to trial, on account of the absence of some of his witnesses. On this day the court said the application was premature, (a) as the plaintiff had the whole of the term, next after that in which issue was joined, to proceed to trial in, and therefore

Discharged the rule with costs (b).

(a) There were other days appointed for sittings in the term, after the 3d of *February*. *Quere*, Whether the defendant would not have been entitled to judgment, as in case of a nonsuit, if he had waited till the end of the term before he made his motion?

(b) [See *Frampton v. Payne*, ante, p. 65. and *Woulfe v. Sholls*, post, p. 282.]

FOLLIOTT v. OGDEN.

DEBT on bond, dated *New York*, *October* 10, 1769, for 4000 *l.* of current money of the province of *New York* in *North America*, being 2250 *l.* of lawful money of *Great Britain*.

Plea, after *Oyer* (by which it appeared that the defendant, one *Richard Morris*, and *Lewis Morris* were jointly and severally bound) 1st. *Richard* and *Lewis Morris solverunt post diem*. 2d. Defendant *solvit post diem*. 4th. That at the time of making the said writing obligatory, the plaintiff, *Richard Morris*, *Lewis Morris*, and the defendant, were severally and respectively persons residing within the United States of *America*, and con-

ing the war, after the declaration of independence by the Congress, both parties are attainted, their property confiscated, and vested in the respective States, of which they were inhabitants, by the legislative acts of those States, and a fund provided for payment of the debts of *B.* [The court of C. P. held that] *A. may maintain an action on the bond against B. in England*. That the several acts of attainder and confiscation, as passed by *Sovereign Independent States*, did not disable *A.* from suing, nor exempt *B.* from being sued in *England*. And that it was not a good plea in bar of an action at law, that an ample fund was provided out of the effects of *B.* in *America*, for the payment of his debts, to which *A. might and ought to have resorted, and been paid*, though this might be a ground for relief, in equity. [See the note at the end of this case, p. 136.]

tinued

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The plaintiff has the whole of the term, next to that in which issue is joined, to try his cause in.

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A and *B.* being inhabitants of the United States of *America*, while those States were colonies of *Great Britain*, and before the war broke out between the two countries, *B.* executes a bond to *A.* During

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tinued so, &c. till after the 22d of *October* 1779; that on that day, the said sum of money, &c. being due and unpaid, &c. and the plaintiff then residing at *New York*, then being one of the United States of *America*, by a law of the state of *New York*, he was *ipso facto* attainted of the offence of adhering to the enemies of the said state of *New York*, and all and singular the estate, both real and personal, held or claimed by him, on the 22d of *October* 1779 was forfeited to, and vested in the people of *New York*, which said law of the said state of *New York*, from thenceforth hitherto hath been, and still is, in full force and effect, and that the said writing obligatory, and all the money due thereon, became and was, and from thenceforth hitherto hath remained and continued, and still is forfeited to, and vested in the people of the said state of *New York*, &c.

4th. That at the time of the making the said writing obligatory, the abovementioned parties were resident within the United States of *America*, that the defendant was bound only as a surety for the said *Richard* and *Lewis Morris*; that the defendant, at the said time, &c. was resident in the state of *New Jersey*, then being one of the United States of *America*, and in possession of real and personal property, more than sufficient to pay the said sum of 4000 *l.* and his other debts; that on the 2d of *January* 1779, being so possessed, &c. he was attainted according to the laws and statutes of the said state of *New Jersey*, of adhering to the enemies of the said state, and thereby all his real and personal estate, within the said state of *New Jersey*, was forfeited to, and vested in, the said state of *New Jersey* for ever; that it was provided by the said state of *New Jersey*, that the property of the defendant so forfeited to and vested in the said state, was in the first place made liable to the payment of all his debts, and demands against him; that in consequence of his attainder, all his property was seized, which at the time of the seizure was more than sufficient to pay the said sum of 4000 *l.* and all his other debts; that after his attainder, the plaintiff was at liberty to make, and might have made demand of the state of *New Jersey*, of the said sum of money due to him upon the said writing obligatory, against the real and personal estates of the defendant so forfeited, &c. and might have been paid thereout.

5th. To the same effect as the 4th, but reciting more particularly the several acts of attainder and confiscation passed by the

the state of *New Jersey*, against the defendant, and that the plaintiff might and *ought* to have demanded payment of the bond from that state, &c. 1789.

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Replication.—Issue tendered on the 1st and 2d pleas. To the 3d plea, that at the time of making the said supposed law of the state of *New York*, in that plea mentioned, the said state was not one of the *United States of America*, but was one of his Majesty's colonies in *America*, then in open rebellion against his Majesty, &c. General demurrer to the 4th and 5th pleas.

Rejoinder.—Issue joined on the 1st and 2d pleas. To the 3d, replication, that before the making of the said law of the state of *New York*, in the 3d plea mentioned, to wit, on the 4th of *July* 1776, the several colonies in *America* (mentioning them all by name, and among them *New York* and *New Jersey*) separated themselves from the government and crown of *Great Britain*, and united themselves together, and were by the people of the said respective colonies in congress, declared and made free and independent states, by the name and style of the *United States of America*, and to have full power to do all acts and things, which independent states of right may do; that on the 3d of *September* 1783, by the definitive treaty of peace and friendship, made and signed at *Paris* on that day, between his Majesty and the said *United States of America*, his Majesty acknowledged the said *United States of America*, to be free, sovereign, and independent states, and treated with them as such; and by the said treaty, the several laws which had been made and passed by the legislatures of the said respective states, after their declaration of independence, for the confiscation of the property of persons within the said respective states, were recognized and admitted to be valid; and that before the making of the said law of the state of *New York*, to wit, on the 4th of *July* 1776, and from thence continually hitherto, the said *United States* became, and were divided from his Majesty's dominion and government, and absolutely independent thereof; and that long before, and at the time of making the said law of the said state of *New York*, and from thence hitherto, the people of the said state have exercised, and still do exercise, sovereignty, legislation, and government, within the said state of *New York*, separate and distinct from the legislation and government of *Great Britain*, and that the said law of the said state of *New York*,

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Joinder in demurrer to the 4th and 5th pleas, &c.

Surrejoinder.—That by the treaty of peace, the said several laws, &c. were *not* recognized and admitted to be valid, &c.

Rebutter.—That by the first article of the treaty, his *Britannic* Majesty acknowledges the said United States to be free, sovereign, and independent states, and treats with them as such: that by the 5th article of the treaty, it was agreed between his Majesty and the United States of *America*, that the congress should earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights, and properties, which had been confiscated, belonging to real *British* subjects, and also the estates, rights, and properties of persons resident in districts in the possession of his Majesty's arms, and who had not borne arms against the said United States; and that persons of any other description, should have free liberty to go to any part of any of the thirteen United States, and therein remain twelve months unmolested in their endeavours to obtain restitution of such of their estates, rights, and properties, as might have been confiscated; that congress should also recommend to the several states, a re-consideration and revision of acts and laws, &c. and should also earnestly recommend to the states, that the several estates, rights, and properties of such last-mentioned persons, should be restored to them, they refunding to any persons, who might be then, at the time of making the said treaty, in possession, the *bona fide* price (where any had been given) which such persons might have paid in purchasing the said estates, rights, or properties, since the confiscation, &c. and that no persons who then had any interest in confiscated lands, either by *debts* or otherwise, *should meet with any impediment in the prosecution of their just rights*, that the plaintiff at the time of making the said law of the state of *New York*, and of the signing the definitive treaty, was resident in a district in the possession of his Majesty's arms, within the state of *New York*, and had not borne arms against the said United States; and also that by the sixth article of the treaty, it was agreed, that there should be no future confiscations made, nor any prosecutions commenced against any person, by reason of the part which he might have taken in the then war, and that *no person should suffer any future loss, either in his person, liberty, or property,*
and

and that those who might be in confinement on such charges, at the time of the ratification of the treaty, should be immediately set at liberty, and the prosecutions so commenced should be discontinued, &c.

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General demurrer to the rebutter, and joinder in demurrer.

This cause was argued in *Easter* term 1788, by *Watson*, Serjt. for the plaintiff, and *Le Blanc*, Serjt. for the defendant, and a second time in the present term, by *Lawrence*, Serjt. for the plaintiff, and *Adair*, Serjt. for the defendant. The arguments on the part of the plaintiff were, in substance, as follow.

The two material questions which arise on these pleadings are,
1. Whether, under the circumstances of this case, the plaintiff had a right to sue? 2. Whether, under those circumstances, the defendant was liable to be sued, in *England*, on a bond made in *America*?

The first question may be resolved, by considering the effect of the act of attainder and confiscation, passed against the plaintiff by the state of *New York*; the second, by considering the effect of the like acts of the state of *New Jersey*, passed against the defendant. Now these acts, having been made by persons, who, at the time of making them, were subjects in open rebellion, must have been at that time void. If they were allowed to be valid, it would follow, that the acts of rebels are binding, in proportion to the violence of their rebellion. Laws can only bind those who are subject to them; but no one can be legally subject to the acts of rebels. Although in this country, the protectorship of *Cromwell* continued many years in possession of sovereign authority, yet it was necessary, at the restoration, to pass a law (a) expressly to confirm such proceedings of the commonwealth, as were thought proper to be confirmed, all others being void, having been made by rebels. An usurped power can make no valid laws, as long as efforts are made to reduce those who usurp it to obedience. Continued efforts were made by *Great Britain* to bring *America* to submission, long after the acts in question were passed. It is laid down by *Puffendorf* (b), that "if the constitution of a state be altered by an unjust rebellion, the liberty thus usurped, continues so long unlawful, as the rightful prince shall labour to reduce the rebels to obedience, or at least,

(a) 12 Car. 2, c. 12.

(b) Lib. 7. c. 7. f. 5.

" shall

1789. "shall by solemn declaration protest, and preserve his right
 "over them." The defendant does not, indeed, in his re-
 joinder, insist on the sovereign authority of the state of *New*
York, at the time of passing the law against the plaintiff, but
 relies on the subsequent treaty of peace to confirm that, toge-
 ther with the other laws of attainder and confiscation. But
 the treaty could not have this effect. It could not mean to
 ratify those acts which were done by the *Americans* in a state
 of rebellion, and at the time when this country was labouring to
 reduce them to obedience: it takes notice of such acts, but does
 not imply a retrospective confirmation of them. But supposing
 the design of the treaty had been to confirm them, yet the king
 had no such power. The crown cannot ratify acts of violence,
 without the consent of the subject, expressed by passing a law
 for that purpose. The sovereign of a state may abandon such
 of his subjects as he is unable to protect or govern, but he can-
 not deprive them of the legal rights of that society, into which
 they originally entered: he cannot force them to submit to the
 authority of another state. *Vattel*, liv. 1. c. 18. f. 195. *Puffen-*
dorff, lib. 8. c. 5. f. 9. So in the present case, the king had no
 power to confirm the attainder of loyal subjects of his govern-
 ment, made while they were under the protection of *Great*
Britain, to vest their property in the *American* states by ratifying
 the confiscation of it, nor to deprive them of the benefit of their
 personal remedies and engagements. If this bond, therefore, had
 been actually seized by the people of *New York*, it could not have
 been contended, that the plaintiff's right of action was taken
 away by the seizure made, *flagrante bello*, and before any ac-
 knowledgment of the lawfulness of the power making it: but
 as the bond was not seized, as it was never divested out of him,
 and as he is still possessed of it, clearly no principle of law can
 prevent his suing upon it in *England*. He could not have
 brought an action in *America*, being there proscribed, and
 therefore had not his choice of a double remedy. But ad-
 mitting the legality of the proceedings against the plaintiff, the
 defendant cannot take advantage of the criminal laws of a fo-
 reign country. A mere assignment of property might be ac-
 knowledged, but the vindictive acts of one state, cannot be en-
 forced in another; it being a principle of the law of nations,
 that a criminal can only be punished by that state, whose laws
 he has offended. *Vattel*, liv. 1. c. 19. f. 232. But if this plea
 were

were allowed, of the disability of the plaintiff to bring the action, offences committed by him in *America* would be punished in *England*.

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The second question may be answered by examining whether the defendant can avoid the plaintiff's demand, by pleading his own attainder, and the confiscation of his property. At the time when the contract was made, the plaintiff had a right of action: this right was personal and transitory, it continued in him as long as the bond remained in his possession unsatisfied, and was not divested by any situation, in which the property of the defendant was placed. The plaintiff is not stated, in this plea, to have been guilty of any offence; the defendant relies on his own treason against the state of *New Jersey*. Now admitting his attainder and the confiscation of his effects to be legal, the object of those acts was punishment, not reward, to distress, rather than to favour. They did not mean to prevent a creditor from bringing a personal action, or to destroy any contract made by him with the defendant. Care was taken in the first place, that his debts should be paid, but if he be suffered to avail himself of this defence, the design of these laws of *New Jersey* will be inverted; the debtor will receive the benefit of them by avoiding the payment of a just debt, and the creditor will be deprived of a provision, expressly made in his favour. A proscribed *American* is not entitled to greater privileges than any other *British* subject. There is no ground in the law of *England*, to exempt an attainted person from his engagements; though he be legally dead to every other purpose, he is alive to that of being sued, and may be served with process for debt while in prison, though his whole estate be confiscated; otherwise he would have a privilege which the law never intended. *Hawk. P. C. b. 2. c. 36. s. 5.* A bankrupt forfeits the whole of his property, but would be liable to be sued, if it were not for the provisions of a positive statute. But the defendant farther insists, that his forfeited property was more than sufficient to discharge this, with his other debts, and to that fund, the plaintiff might, and ought to have resorted. Supposing this to be true, it is not a bar to the present action; it shews only that the plaintiff had another remedy, but does not take away his right of choosing which remedy he would pursue: it can be no defence at law, whatever it may be in equity. *Bannister v. Trussell, Cro. Eliz, 516.—Hornby v. Houl-*

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ditch,

1789. *ditch*, Andr. 40.—*Houlditch v. Mist*, 1 P. Wms. 695.—*Kempe v. Antill*, 2 Browne 11. *Wright v. Nutt*, in Canc. Jan. 23, 1788 (a). But in fact, the fund set apart for the payment of the defendant's debts, was not solvent to the plaintiff, who was proscribed. He brings his action here to obtain that satisfaction of which he was deprived in *America*. All circumstances of hardship must be laid out of the case. Both parties have been unfortunate, neither delinquent. But if a question could be made, Whether, in a situation equally distressful, a person who had lent money should lose it, or one who had been a surety for the repayment, should recede from his engagement? it must clearly be decided in favor of the lender; every principle of justice requiring, that the rights of contract should be preserved free from violation.

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Lord *Loughborough* mentioned the case of *Ramsay v. Macdonald*, *Foster's Rep.* 61. as having determined the point, that an attainted person is liable to be sued in a civil action.

On behalf of the defendant, it was contended, that the several acts of attainder and confiscation passed in *America*, were the acts of sovereign, independent states, and ought to be esteemed valid when brought judicially before the court. The argument drawn from the previous rebellion of those states, and the passage cited from *Puffendorff* on that head, is only applicable to that sort of rebellion, in which the people take arms against the sovereign for a redress of grievances, but do not separate from the state, and cause a dissolution of government. Admitting the authority of *Vattel*, that citizens of a free state may withdraw themselves, and of *Puffendorff*, that a sovereign cannot bind his subjects by giving up part of his dominions; yet, in this case, the record expressly states, that both the plaintiff and defendant remained inhabitants of the respective states of *New York* and *New Jersey*: by this they acquiesced in, and were amenable to the laws of those states. So when the native of any foreign country, owing allegiance to another sovereign, resides in *England*, he acknowledges by his residence, a submission to *English* laws. It is said by (b) *Vattel*, that "When a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties, in every respect is the same with a publick war,

(a) *Ibid* pag. 136.

(b) *Liv.* 3. c. 18. f. 295.

" between

"between two nations." By the acts of this country the *Americans* were *de facto* acknowledged to be independent, long before the treaty of peace. In the year 1776, commissioners were sent out to treat with them, and persons taken in arms were considered as prisoners of war. To put the matter beyond all doubt, the definitive treaty begins with an acknowledgment of antecedent independence. That independence must be dated from the declaration of the congress; no other period can be fixed for its commencement. The states of *America* then being independent, had a right to affect, by their laws, all persons resident within them. The state of *New York* exerted that right, by inflicting pains and penalties on the plaintiff, by which they deprived him of his civil capacity, and rendered him unable to bring any action. One effect, among others, of an act of attainder, is to create a personal disability to sue in courts of justice. But admitting that the plaintiff was under no personal incapacity to bring an action in *England*, by the penal laws of a foreign state, yet the subject matter of this suit was divested out of him, and absolutely vested in the people of *New York*. All his property was taken from him by the act of confiscation. Mere possession of the bond without the right, is not sufficient to support an action. If a bankrupt possessed of a bond, brings an action upon it, possession is not sufficient evidence of right; it is a common plea in bar, that the right of action was divested. The system of bankrupt laws, favours of a penal nature, and in no country more than in *Holland*; but the bankrupt laws of *Holland* are allowed to take effect here, as divesting all property out of the bankrupt, and vesting debts due to him in *England*, in the curators or assignees in that country: they have been often admitted in the court of the mayor of *London*, in cases of foreign attachment, and were recognized in Chancery, in the case of (*a*) *Solomons v. Rofs*, 1764.

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(*a*) *Solomons v. Rofs*, in Canc. 26 January, 1764, before Mr. Justice *Batbush*, who sat for Lord Chancellor *Northampton*. *

Messrs. *Deneuville*s, merchants and partners at *Amsterdam*, corresponded with *Michael Solomons* and *Hugh Rofs*, merchants in *London*. On the 18th of *December* 1759, the *Deneuville*s stopped payment; on the 1st of *January* 1760, the chamber of *Desolate Estates* in *Amsterdam* took cognizance thereof, and on the next day they were declared bankrupts, and curators or assignees appointed of their estates and effects. On the 20th of *December* 1759, *Rofs*, who was a creditor of the bankrupts to the amount of near 3000*l.* made an affidavit of his debt in the Mayor's Court of *London*, and attached their monies in the hands of *Michael Solomons*, who was their debtor to the amount of 1200*l.*

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29. [Lord Loughborough said, in this part of the argument, that he was counsel in the case of *Solomons v. Rofs*, which was decided solely

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On the 8th of March 1760, *Rofs* obtained judgment by default on the attachment, and thereupon a writ of execution issued against *Michael Solomons*, who was taken in execution, but being unable to pay the 1200*l.* gave *Rofs* his note payable in a month; on which *Rofs* caused satisfaction to be entered on the record of the judgment.

A few days after, one *Israel Solomons*, who had a power of attorney from the curators to act for them in England, filed a bill, making himself and the curators plaintiffs, praying that the defendant *Michael Solomons* might account with them for the effects of the bankrupts, which were in his hands, might pay and deliver the same over to *Israel Solomons* for the use of the curators, and be restrained from paying or delivering them over to *Rofs*.

Michael Solomons then filed a bill by way of interpleader, praying an injunction, and that he might be at liberty to bring the 1200*l.* into court. This money was accordingly paid into the bank, in the name of the accountant-general, pursuant to an order of the court.

The decree directed, *inter alia*, "That the stock purchased with the money paid into the bank, should be transferred to *Israel Solomons*, for the benefit of the creditors of the bankrupts, and that *Rofs* should deliver up the note given by *Michael Solomons* for 1200*l.* to be cancelled."

Jollet and Reirve'dt v. Deponbieu and Baril, in Can. November 23, 1769, before Lord Chancellor Camden.

The *Deneufvilles*, merchants at Amsterdam, (but not the same as those mentioned in the preceding case,) on the 30th of July 1763, stopped payment. On the 8th of October the plaintiffs were appointed curators of their estate and effects. At the time when the *Deneufvilles* stopped, and were declared bankrupts, they were indebted to Messrs. *Deponbieu* and Co. merchants of London, in 1600*l.* and Messrs. *Baril* and *Texier* were indebted to the *Deneufvilles* in 2131*l.* 18*s.* 11*d.* On the 5th of January 1764, the *Deponbieu* and Co. made an affidavit of their debt, and on the 12th of that month attached the monies of the *Deneufvilles* in the hands of *Baril* and *Texier*. Pending the attachment, the curators filed their bill against *Deponbieu* and Co. and *Baril* (*Texier* being absent) praying, "that an account might be taken of all dealings and transactions between the bankrupts and *Baril* and *Texier*, that the balance might be liquidated, and paid to the plaintiffs, and that the other defendant might be restrained by injunction, from any further proceedings against *Baril* and *Texier* in respect of the foreign attachment, or any security given in consequence thereof."

It was decreed, that the plaintiffs were entitled to recover from *Baril* and *Texier* the sum of 2131*l.* 18*s.* 11*d.* being the balance of an account current, transmitted to the *Deneufvilles* on the 24th of October 1764, (which the plaintiffs consented to accept as the real balance due, and to waive all further account, and therefore) "that it should be referred to one of the Masters, to compute interest on the principal sum of 2131*l.* 18*s.* 11*d.* at 4*per cent.* from the 26th of October 1764, and that a perpetual injunction should issue against *Deponbieu* and Co. to restrain them from proceeding on the foreign attachment."

It appeared from the proofs taken in the cause, that a bankrupt's effects, by the laws of Holland, vest in the curators only from the time of their being appointed, and not by relation to the time of committing the act of bankruptcy.

Neal and another, assignees of *Grattan v. Cottingham and Houghton*, in Canc. in Ireland, November 16, 1764.

Grattan a merchant in London was indebted to *Cottingham*, a merchant in Dublin in 362*l.* 4*s.* 1*d.* and the *Houghtons* were indebted to *Grattan* in 600*l.* On the 27th of

solely on the principle, that the assignment of the bankrupts' effects, to the curators of desolate estates in *Holland*, was an assignment for a valuable consideration, and therefore acknowledged in this country, agreeable to *Captain Wilson's* case in the House of Lords.] 1789. FOLLIOTT " OGDEN-

But supposing the plaintiff not to be disabled from suing, either in respect of his person or his property, yet the defendant is not liable to be sued in the present action. Both parties were resident citizens of *America*, the contract between them was made with a view to be executed in that country, not in this. By a subsisting law of the state, in which the contract was made, the whole property of the defendant was forfeited to that state, subject in the first place to the payment of his debts. An ample and solvent fund was provided for that purpose, to which the plaintiff might and ought to have resorted for satisfaction of his demand. This stands on the record, admitted by the demurrer. The people of *New Jersey* were trustees for the plaintiff with other creditors; this was an equitable payment to him, in equity an assignment to trustees for payment of debts, being *quasi* payment. The plaintiff having neglected to make use of the provision offered him in *America*, is precluded by his negligence from having an action in *England*. Besides, the co-obligors are resident in *America* and amenable to its laws; as they could not plead a recovery had, nor sue on an assignment made, in this country, neither could the defendant have any action over, against them.

of October 1763, *Cottingham* made an affidavit of his debt, and commenced an action in the Tholsel court of *Dublin* against *Grattan*, and on the 31st of that month attached the monies due to him from the *Houghtons*, in their hands. On the 21st of November judgment was signed by default, and on the 9th of January 1764, the *Houghtons* were taken in execution on a *ca. sa.* who, in order to procure their discharge, paid *Cottingham* 600 l. the money due from them, and 1 l. 19 s. 11 d. costs.

On the 28th of October 1763, a commission of bankrupt issued against *Grattan* in *England*, who on that day was declared a bankrupt. On the 10th of November 1763, his effects were assigned to the plaintiff's assignees. On the 16th of November 1764, they filed a bill in the court of Chancery in *Ireland*, against *Cottingham* and the *Houghtons*, praying, that an account might be taken of all such sums of money as had been received by *Cottingham* from the *Houghtons*, for any debt due by them to *Grattan* before his bankruptcy, and that interest might be computed thereon from the times when he received the same respectively, and that he might be decreed to pay what should be found due to the assignees.

As this was the first cause of this kind ever decided in *Ireland*; the Lord Chancellor called in the assistance of several of the judges, and after great consideration, with the approbation of the judges whom he consulted, pronounced a decree in favour of the plaintiffs, and ordered *Cottingham* to pay them the money which he had received of the *Houghtons*.

But see *Cooke's Bankrupt Law*, 243 and 244.

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Though the plaintiff therefore should recover in this action, the defendant will be deprived of his remedy over. But as the contract was made in a foreign state, the laws of that state must be the measure of justice between the parties. The reason why a bankrupt would be liable to be sued, if not protected by a positive statute, is, that the fund arising from his effects, is not sufficient for the payment of all his debts: it is not an ample, solvent fund, like that raised out of the forfeiture of the defendant's property: if the creditors be satisfied *in toto*, the commission is set aside. In the case of *Banister v. Truffell*, it was holden, that a mere attainder of felony was no bar to an action; neither is it contended to be in the present case. An attainder at common law, does not prevent the attainted person from being served with civil process, because no fund is set apart for the payment of his debts: but where the attainder is by an act of parliament a fund is usually provided for that purpose. In the case of *Hornby v. Houlditch*, the whole of the defendant's property was not divested by the *stat. 7 Geo. 1. c. 28.*, there was a remaining fund to which the plaintiff might have applied. So also in *Houlditch v. Miff*, the property was only partially taken away: the authority indeed of that case is shaken by the lord chancellor in *Wright v. Nutt*, where his lordship also held, that this country was bound to take notice of the *American* laws, as acts of independent states; that where a sufficient fund was provided, and the creditor guilty of laches in not resorting to that fund, and having the means of possession, had not made use of those means, that he ought upon principles of justice and equity, to be prevented from pursuing the debtor to harass him with another action. Here the means of possession are admitted on the record. The same answer may be given to the case of *Kempe v. Antill*, in which the chancellor delivered a similar opinion. Upon the whole therefore, on the face of the pleadings, the plaintiff is reduced to this dilemma; he is either disabled to sue by the matters contained in the third plea, and there is an end of the action; or his capacity to sue remaining, it appears from the fourth and fifth pleas, that an ample fund was provided, to which he might, and ought to have resorted for payment of his debt, but to do which he of his own laches neglected. In either case, the court will pronounce judgment for the defendant.

On this day, the following judgment of the court was delivered by Lord LOUGHBOROUGH.

It is unnecessary for me to state the pleadings in this case at length, as the only two material questions arise on the third and fourth

fourth pleas. The third plea in substance is, that the plaintiff was attainted by the state of *New York*; that all his estate and effects were confiscated and forfeited to the people of that state, and that in consequence, the bond in question and all the money due upon it was forfeited to, and vested in them. Now there is no occasion to enter into a discussion of the matters contained in the replication, rejoinder, sur-rejoinder, or rebutter, for admitting this act of the state of *New York*, to be of as full validity as the act of any independent state, which the defendant contends, and which it certainly was, still it cannot operate as a bar to the plaintiff's demand in this action^(a). If it were a bar, it must either be in respect of his person, as disabled to sue, or in respect of the subject matter of the suit. It was admitted in the argument, that by the criminal sentence of attainder, of one sovereign, independent state, no personal disability to sue in another was created; but it was contended, that the property of this bond was divested out of the plaintiff by act of the law of that country, to which both he and his property were subject. But if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they by divesting the property of a person in that country, take away his right of action in *England*. The subject matter of this action being a bond, it could only be sued for according to the laws of *England* relating to bonds; supposing therefore the right of the plaintiff to be gone, that could not be set up in bar of the action, which must be brought in the name of the present plaintiff, whoever might be in possession of the bond, since a chose in action is not assignable at law, and the defendant could not plead that the obligee had assigned it. I would even go farther, and say, a right to recover any other specific property, such as plate, or jewels in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority: a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations, and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.

The other question arises on the fourth plea, which states, that the defendant was attainted by the state of *New Jersey*; that all his estate and effects were confiscated, and vested in the

(a) [See Lord Kenyon's opinion *contra* on this part of the case, 3 Term Rep. B. R. 731.]

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people of that state, and in the first place made liable to the payment of all his debts; that a fund was raised more than sufficient to pay them, to which the plaintiff might and ought to have resorted. This plea has the same tendency with the third, to prevent the plaintiff from recovering; but the whole amount of it is a ground in equity for relief against a creditor, who would make an oppressive use of one security in preference to another; for I perfectly agree with the doctrine of the case of *Wright v. Nutt*, and think that if the plaintiff in this action might have recovered his debt out of the fund appropriated to that purpose in *New Jersey*, and has wilfully omitted so to do, there would be a good reason for equity to interfere: if he might have recovered the whole, this action might on equitable grounds be entirely stopped; if only a part, equity would relieve *pro tanto*. This is every thing except what it ought to be, and comes as near as it could, to a plea of payment; but in a court of law, nothing short of actual payment is good. Upon the whole therefore, as the case stands, there is nothing to prevent this court from giving

Judgment for the plaintiff (a).

(a) [This judgment was affirmed by the court of K. B. on a writ of error, *Trin.* 30 G. 3. 3 *Term Rep. B. R.* 726. but on grounds different from those on which the court of C. P. had proceeded: The court of K. B. holding that the acts of confiscation passed in the several States of *N. America* after the declaration of independence, and before the treaty of peace, by which this country acknowledged their independence,

were to be considered as a nullity in the courts of law here.

The judgment of the court of K. B. was affirmed in *Dom. Proc.* 25 Feb. 1792. See 4 *Parl. Cases*, (8vo.) 111. and the note there. See also the case of *Dudley v. Folliott*, E. 30 G. 3. 3 *Term Rep. B. R.* 584. where the court of K. B. having no doubt on the law, and thinking that it would lead to improper discussion, would not permit the question to be argued.]

[The Reporter was favoured with the following Case, cited in that preceding of *Folliott v. Ogden*.]

WRIGHT v. NUTT, and another. In Chancery,
January 23, 1788.

In circumstances resembling those of the preceding case it was a good ground of relief in equity, that an ample fund was

provided out of the effects of the attainted debtor in *America*, for the payment of his debts, to which the creditor might have resorted, and out of which he might have been paid. Accordingly, an injunction was granted by the court of Chancery to prevent execution from being taken out on a judgment obtained in an action at law by such a creditor.

THIS was a motion for an injunction, upon the coming in of the answer of one of the defendants, to restrain them from taking out execution on a judgment obtained in an action at law. The case made by the will was as follows:

That Sir *James Wright*, deceased, was for many years before and in the year 1774, and from thence to the acknowledgment of the independence of the United States of *America*, go-

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governor of the then province of *Georgia*, in *North America*, and constantly resided there, till the troubles in that country commenced; in the course of which residence, he acquired very considerable property in the said province, consisting of plantations, negroes, cattle, and other effects on his said plantations: that in the course of managing, and cultivating the said plantation, Sir *James Wright* purchased of *Miles Brewton*, of *South Carolina*, certain negro slaves, at the price of 880*l.* 5*s.* current money of *South Carolina*, being of the value of 1300*l.* sterling or thereabouts, for which he gave the said *Miles Brewton* his promissory note, payable at a future day.

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“ That the disturbances in *America*, having soon after commenced, and the persons who opposed the *British* authority, having assumed to themselves the government of the said province of *Georgia*, Sir *James Wright*, and the other persons who remained loyal to *Great Britain*, were obliged to fly from the said province; that Sir *James Wright* left behind him, the whole of his property to a considerable amount, and amongst the rest, the several slaves which he had purchased as aforesaid; that the persons who on that occasion assumed the government, and established themselves in the province of *Georgia*, in the month of *March*, 1776, passed an act of assembly in the state of *Georgia*, intitled, “ An Act for attainting such persons as are therein mentioned of high treason, and for confiscating their estates both real and personal, to the use of that state, for establishing boards of commissioners for the sale of such estates, and for other purposes therein mentioned,” and it was thereby enacted, that Sir *James Wright*, and 115 other persons, should be attainted, and adjudged guilty of high treason, and should be liable to the several penalties therein mentioned, and that all the land and heritages, debts, goods, and chattels whatsoever, of such persons within that state, should according to the several estates and interests, which the persons so attainted had therein, be deemed, and were thereby enacted, and declared to be in the real and actual possession of the government thereof, without any office of inquisition; and to the end, that all the estates of the persons thereby attainted, and the incumbrances thereon, might be the better discovered and ascertained, and that the same might be applied to the uses of the state, it was enacted, that five persons should be appointed in manner therein mentioned, to act as a board of commissioners,

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for

1789. for each county, within the said state, who were to sell all the real and personal estate of the several persons named in the said act, and the monies arising by such sales were to be paid into the treasury of the said state, and that all persons having any demands on the forfeited estates, were to lay their claims before the board of commissioners; and after liquidating all such claims on the said forfeited estates, the said board of commissioners, was to empower the sheriff of the county, or any person they might appoint, to sell the estates of the attainted persons, both real and personal, after giving thirty days, at least, public notice; and then to sell by public auction, for the money of that state only, and *to the inhabitants being actually citizens, and residents of and within the same*; and the persons having any claims or demands on the estates of the attainted persons, were to make the same *before the expiration of 60 days after the passing of that act, or to lose their claims*: that possession of all the effects of Sir *James Wright* was taken under, and by authority of the said act; that *Miles Brewton*, being a citizen or inhabitant of the said province of *South-Carolina*, and a friend to the United States of *America*, and inimical to the government of *Great Britain*, became entitled to claim, and be paid out of the confiscated estates and property of Sir *James Wright*, the money due to him upon the said promissory note, and that he actually made some claim in respect thereof; but before any thing had been done towards liquidating the same, and in or about the month of *December 1778*, possession was taken of the said province of *Georgia* by the king's troops, and the province was reduced under the *British* government; whereupon Sir *James Wright* was ordered to return to the said province, and resume his government there, which he accordingly did: that upon his return to the said province, he regained possession of his plantations and hereditaments within the said state, but some parts of his property upon the said plantation, had been sold under the authority of the said act of assembly; that Sir *James Wright* continued in possession of his government until the month of *June 1782*, during which time he continued to cultivate, and greatly improved his said plantation; that his Majesty's troops evacuated the said province of *Georgia* in the month of *July 1782*, and in consequence thereof, Sir *James Wright* and the other persons, who had adhered to the *British* interest in the said province, were again compelled to fly from it, and leave all their landed property and most of their effects; that some
time

time before the evacuation of the province, the inhabitants in the *American* interest, declared the province of *Georgia* to be an independent state, and chose from time to time a house of assembly of their own, as the legislative body for the said state, and by an act passed by the House of Assembly, on the 4th day of *May* 1782, intituled, "An act for inflicting penalties on, and confiscating the estate of such persons as are therein declared guilty of treason, and for other purposes therein mentioned, reciting the former act, and that it was necessary to carry the same into full execution," it was enacted, that Sir *James Wright*, and many other persons therein named, should be, and were thereby banished from that state for ever, and if they returned to that state, should be guilty of felony without benefit of clergy, and that all the estates, both real and personal, of all the said persons, with all debts, dues, and demands whatsoever, due to them should be confiscated to the use and benefit of that state; and the monies to arise from the sales which should take place by virtue and in pursuance of that act, should be applied to such uses as that legislature should direct; and that all debts, dues, and demands, due or owing to merchants, or others residing in Great Britain, were thereby sequestered, and the commissioners appointed by the said act, were thereby impowered to recover, receive, and deposit the same in the treasury of the said state in the same manner as debts confiscated, there to remain for the use of the said state; and reciting, that there were several just claims and demands, which might be made by the good and faithful citizens of that state, and others of the United States of America, against the estates confiscated by that act, it was enacted, that any persons well affected to the independence of the United States, having debts owing to them from the persons named in that act, or who had any just claim in law or equity, against any of such confiscated estates, should bring his claim or enter his action, within the space of 12 months from passing of that act, and in default thereof, every such person should be for ever debarred from deriving any benefit from the same; that the act then proceeded to direct the mode, in which such creditors were to proceed, at their option, either by claim before the commissioners, to the end that the legislature might direct, with respect to such creditors, what to justice should appertain; or by action at law, in which case the sum recovered by verdict, was to be paid by a certificate to be issued by the governor or commander in chief, which certificate was to be taken in payment for any purchase made, at the

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the sales of the confiscated estates; that by other acts of the said state of *Georgia*, and of the General Congress, the said Sir *James Wright* was rendered incapable of suing any person in *Georgia*, or any other of the United States: that under the acts of confiscation, the *American* government of the state of *Georgia* seized and took possession of all the effects of Sir *James Wright*, to the amount of 80,000*l.* which were sold for the use of the state; that some time before the month of *June* 1782, the said *Miles Brewton*, made his will, and thereby appointed *Charles Pinkney* and others executors; that the said *Charles Pinkney* soon afterwards died, having made a will, and thereby appointed his son *Charles Pinkney*, of *South Carolina*, and a member of the *American* congress, and others executors; that the said *Miles Brewton* in his life-time, or his executors after his death, not having (as was alleged) got any satisfaction under the first mentioned act of assembly, for the said promissory note of 8802*l.* 5*s.* out of the estate and effects of Sir *James Wright*, confiscated under that act, the said *Charles Pinkney* the son, as personal representative of *Miles Brewton*, made a claim of the said sum of 8802*l.* 5*s.*, with interest, under the authority of the last-mentioned act, against the estate and effects of Sir *James Wright*, confiscated thereby, and procured himself to be admitted creditor for the same; that the defendant *Joseph Nutt*, acted as attorney for the said *Charles Pinkney*, under a power of attorney for that purpose, and afterwards obtained letters of administration from the prerogative court of *Canterbury*, of the goods and chattels of *Miles Brewton*, limited until his original will should be brought in; and in that character commenced an action at law against Sir *James Wright*, upon the said promissory note, and got judgment in such action by default, and proceeded to execute a writ of enquiry of damages, but before the said *Joseph Nutt* entered up final judgment, in the said action, that is to say, on the 19th day of *November* 1785, Sir *James Wright* died, having made his will, and appointed the plaintiffs executors thereof; that thereupon the said *Joseph Nutt* proceeded to revive the said action against the plaintiffs by *scire facias*, to which the plaintiffs pleaded, and the said *Joseph Nutt* replied, and issue was taken thereupon; the cause was tried on the 4th day of *July* 1786, and that the said *Joseph Nutt* recovered a verdict against the plaintiffs. The bill then proceeded to charge several facts to shew, that if *Miles Brewton*, or the said *Charles Pinkney* had not obtained satisfaction
for

for the said debt, out of the confiscated effects of Sir *James Wright*, in *Georgia*, it was by *their wilful default, that they had not obtained such satisfaction*: and the said *Charles Pinkney* ought to resort to that fund, more especially as Sir *James Wright*, in his life-time, was, and the plaintiffs, since his death, were, *totally unable to recover any of such confiscated effects*; the bill, therefore, prayed that the defendants, *Joseph Nutt* and *Charles Pinkney*, might deliver up the said promissory note to be cancelled, or discharge the plaintiffs from payment of the contents thereof, as not being liable in equity, under the circumstances of this case, to the payment thereof; but in case the court should be of opinion, that the plaintiffs were still liable, in equity, to payment of any part of the contents of such note, then, that it might be decreed, that the said defendants, or the said defendant *Charles Pinkney*, ought in the first place to seek satisfaction for the contents of the said note, out of the confiscated estates and effects of the said Sir *James Wright*; and that the plaintiffs might answer only so much thereof as could not then be, or could not before have been obtained, out of such confiscated estates and effects, and that an account might be taken for that purpose, and the note be delivered up upon payment of what should appear coming on that account, and that an injunction might issue in the mean time.

To this bill the defendant, *Joseph Nutt*, put in his answer; thereby admitted the several acts of Assembly, and proceedings towards the confiscation of the estates and effects of Sir *James Wright*, in *Georgia*, and then stated, that the said *Charles Pinkney*, the younger, claiming to be the personal representative of the said *Miles Brewton*, made a claim of the said sum of 8802*l.* 5*s.* *South Carolina* currency, with interest, under the authority of the last-mentioned act of Assembly, against the estates and effects of Sir *James Wright*, which were seized and confiscated under the authority of the said act, but that he did not, as was believed, procure himself to be admitted a creditor of the said Sir *James Wright*, or upon his said estate and effects, or obtained any order for the payment of the said 8802*l.* 5*s.* currency, or had obtained any satisfaction whatsoever for the same, or any part thereof; but on the contrary, that such claim of the said *Charles Pinkney* was rejected by the commissioners of claims against confiscated estates, and that the commissioners entered minutes of their refusing such claim in their books, in the following words: "At a board of commissioners of claims against the
" confiscated

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1789. " confiscated estates, held at *Savannah*, in the state of *Georgia*,
 " on the 19th day of *December* 1783; present, the Honour-
 WRIGHT " able Brigadier General *McIntosh*, president; the board hav-
 v. " ing taken into their consideration an account preferred by
 NUTT. " *Charles Pinkney*, Esq; one of the executors of *Miles Brew-*
 " *ton*, Esq; deceased, by his attorney *James Moffman*, against
 " the estates of Sir *James Wright*, for 13,200*l.* *South Carolina*
 " currency, and also an account against the estates of *John*
 " *Graham*, &c. are of opinion, that as the late *Charles Pink-*
 " *ney* became a *British* subject, and resided with them above
 " two years, while the *British* courts and laws were open in this
 " state, the accounts due some years before the revolution, and
 " the persons against whom they are brought, able to pay them,
 " those accounts appear in their consequence of too important a
 " nature for this board to determine upon, and therefore they
 " must refer them to the legislature, and especially as it ap-
 " pears, the delay can be no injury to the claimant, who ac-
 " knowledges he may not be sufficiently informed yet, of the
 " true state of some of the accounts, and therefore this board
 " cannot think themselves at liberty to make any provision for
 " the same." He admitted, that he and *Robert Norris*, of
London, were the joint and several attorneys of the said
Charles Pinkney, and that they acted for him, under a power
 of attorney, dated the 26th day of *May* 1784, whereby the
 said *Charles Pinkney*, constituted the defendant, and the said
Robert Norris, his attorneys jointly and severally for him, and
 in his name, and to and for the proper use and benefit of the
 said *Miles Brewton*'s estates to sue for, and recover from the said
 Sir *James Wright*, all such sum and sums of money, as were
 due and owing from him, to the estate of the said *Miles Brew-*
ton: that he had obtained such letters of administration, of the
 goods and chattels of the said *Miles Brewton*, as in the said
 bill mentioned, but that he had obtained the same, as being ne-
 cessary to enable him to recover the said demand against the said
 Sir *James Wright*, for the benefit of the estate of the said *Miles*
Brewton, and apply the money made payable thereby, in discharge
 of a debt, due from such estates of the said *Miles Brewton*, to him
 the defendant; and that when the said *Charles Pinkney* re-
 mitted the said promissory note to the defendant, he directed the
 defendant to obtain payment thereof from Sir *James Wright*,
 and to retain thereout, in respect of the debt due from the estate

of the said *Miles Brewton*, to the defendant, the sum of 1400*l.* sterling; that in *October* 1784 he applied to Sir *James Wright* for payment of his money due on the said note, amounting to 13,263*l.* 2*s.* 9*d.* currency, or 1894*l.* 14*s.* 9*d.* sterling; that in the course of three following months he had several conferences with the said Sir *James Wright*, on the subject of the said demand, who did not deny the same to be justly due, but requested to have them to advise with his friends on the subject of the said debt, concerning which he informed the defendant he intended to apply to parliament for relief, and that the defendant accordingly indulged Sir *James Wright* with time, until the 9th of *January*, 1785, when the defendant received a letter from Sir *James Wright* of that date, wherein he informed the defendant, that, after having maturely considered the subject, he had resolved on applying to parliament, and if the defendant thought proper, he might commence an action against him for the recovery of the same: that the defendant as administrator of *Brewton*, accordingly commenced an action against Sir *James Wright*, in *April*, 1785, to which in *June* following, Sir *James Wright* pleaded a sham plea; but in the month of *November*, 1785, the defendant obtained judgment in the action for 1982*l.* 6*s.* 2*d.* sterling; that then Sir *James Wright* died; and proceedings being commenced to revive the judgment against the plaintiffs as his executors, to which they pleaded, the cause came on to be tried, and the defendant recovered a verdict, and judgment was entered on the 19th day of *July* 1786; that then the plaintiffs brought a writ of error, which was ordered to be non-prossed, it appearing, that on the defendant's agreeing not to proceed by original in the action against Sir *James Wright*, his attorney had undertaken to bring no writ of error: after which the defendant applied to the plaintiffs, to know whether they would pay the debt, and on their refusal, commenced an action on the said judgment, which action was still depending. He admitted that the confiscated property of Sir *James Wright* had been sold, and that by the act of the assembly of *Georgia*, directions had been given for applying the produce, in the first place, in payment of such debts as should be proved against such effects, to the satisfaction of the commissioners, but he did not know of any steps taken towards proving this particular debt, subsequent to the before-mentioned

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entry

1789: entry of the board of commissioners. He admitted that *Charles Pinkney* was a member of the *American Congress*, but insisted that he ought, notwithstanding, to be at liberty to resort to the plaintiffs as executors of *Sir James Wright* for payment of the debt, more especially as *Sir James Wright* in his lifetime received considerable sums of money from the *British government*, in part satisfaction for the loss which he sustained by the confiscation of his property in *America*.

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The *Attorney General*, *Solicitor General*, and *Richards* on behalf of the plaintiffs.

The plaintiffs are intitled to an injunction, at least till the coming in of *Pinkney's* answer; till then, it cannot appear that this demand has not been actually satisfied in *America*. It is stated, that when a claim was made on the confiscated estate, the commissioners did not give a peremptory refusal, but doubting whether they were at liberty to allow the debt, referred the claimants to another tribunal. Until the court therefore can see, whether resort was made to that tribunal, and if it were, what was the event of it, it is impossible to say whether part of the debt has not, or might not have been recovered. In order to the full discussion of this question, it may be necessary to know what the situations and conduct of *Brewton* and *Pinkney* were, as to which, *Nutt* being resident here can give no distinct account, but out of which, when explained by *Pinkney's* answer, many points may arise material in the case. If a person by fraud, has been prevailed upon to give a promissory note, and the payee indorses it over to another, merely for the purpose of bringing an action upon it, but is himself abroad; if the indorsee brings an action, and a bill for an injunction is filed against him, and it should appear from his answer, that the note was indorsed to him merely to enable him to bring an action, in that case the court would grant an injunction till the answer of the real defendant came in. So here, *Pinkney* is the real defendant, and it is possible, that he may by his answer admit that he has received all the money, the claim having never been absolutely rejected by the board of commissioners. It is probable that *Pinkney* would have resorted to an ample fund for payment, rather than pursue an insolvent debtor. Supposing *Sir James Wright* had been alive, and taken in execution here, this would have been a satisfaction for the debt, at the moment perhaps when

Pinkney,

Pinkney might have been receiving the money in *Georgia*. Though the court should be of opinion, that Sir *James Wright* was liable to the payment of the debt, yet if he were alive, he ought to be capable of being put in the situation in which *Pinkney* was, with regard to the debt, before the confiscation and attainder; so also ought the executors of Sir *James Wright*: *Pinkney* ought to be able to entitle them to recover a share of the confiscated effects in his stead. But in this case, neither Sir *James Wright*, if he were alive, nor his executors, since his death, could be enabled so to do by *Pinkney*. The court will insist on *Pinkney's* recovering all he could out of those effects before he sues the plaintiffs, because if he does not recover himself, he cannot enable them to recover from that fund in *America*. It is necessary therefore to grant an injunction, at least till the answer of *Pinkney* comes in. But assuming the case to be, that a person resident in and subject to the United States of *America*, has had an opportunity of access to an estate for the payment of his debt, taken from the debtor by the legislature of that state to which he is subject, the question is, Whether such person shall be permitted to bring an action in this country, against the debtor whose whole property is so taken away, and refuse to take that remedy which the country to which he was subject, thought proper to grant him? In the case of a bankrupt, if a creditor does not come in under the commission, and the certificate is obtained, he cannot sue the bankrupt in another country. *Pinkney* was the real plaintiff at law, a subject of *America*, well affected to the *American* states, who was not disabled from seeking his remedy in that country: this case therefore is different from that of (a) *Kempe v. Antill*, where an action at law was brought against *Kempe* on similar circumstances, and an injunction refused, on the ground of *Antill* being a loyalist, and unable to sue in *America*. It is incumbent on *Pinkney* to shew that he used all due diligence to recover the whole debt in *America*, since it would be grossly unjust, that a creditor who had it in his power to be satisfied in that country, should pursue the unfortunate debtor in this, whose only fault was his loyalty to *Great Britain*. Though in this particular case, *Nutt* made himself the personal representative of *Brewton*, yet in truth he is only attorney

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for *Pinkney*; when he took out letters of administration, he did it as attorney, and acted as such. *Nutt* could not sue in this country, without letters of administration, which he took out under the authority of *Pinkney*. The right of executing in one country, a contract made in another, is founded on the law of nations: but the principle of the law of nations is mutuality; each country allows to the other the advantages it receives. But if any one country should declare, that personal contracts made by foreigners should not be executed within its dominion, though the parties making the contract should there reside, that part of the law of nations would cease, with respect to the country so declaring. The maritime law is adopted by all civilized nations who have any use for it; but some there are who refuse to admit it. The *Algerines* could not demand in *Spain* or *Portugal*, the justice of the country respecting captives at sea, not having themselves received the maritime law, which if not mutually binding, is not binding on either party. So in the present case, the states of *Georgia* seize all the property of Sir *James Wright*, both real and personal, and though they incapacitate him from suing for any debt, yet they declare that they will sue for all debts due to him, and vest them in the publick stock. The creditors, therefore, of Sir *James Wright*, in this country, could not recover their debts in *Georgia*, that state having declared that they would apply those debts which were owing to persons here, to the public service. Every person resident in *Great Britain* is proscribed and deprived of all chance of recovering a debt due to him in *Georgia*. A creditor in *Georgia* would have the land to resort to there, and the person of the debtor here, as incident to a transitory contract; but a creditor in *England* could only betake himself to the effects in *England*; he could not make a claim on the land in *Georgia*, he has not a double remedy. If this debt should be recovered from the personal effects of Sir *James Wright* in this country, payment could not be enforced against his estates in *Georgia*. If therefore mutuality be the true principle on which contracts are transitory, the state of *Georgia* has by its own act rendered contracts there made, no longer transitory, but has fixed them in that country. Whether *Brewton* or *Pinkney* shall, or shall not turn out to have been themselves instrumental to this particular confiscation, yet every person in the state of *Georgia*, has bound himself by the act of those whom he has chosen, and thought fit

fit to represent him: the assent of every person so choosing, is implied to every act of the persons chosen. Every man, therefore, claiming by a right which accrues in that state, must submit to the consequences which follow from the legislature of that state, having rendered it impossible that a claim should be effectually made on the part of any of the persons, comprehended in the acts of attainder and confiscation.

Mansfield and Scott contra. Whatever may be the hardship of this case, whatever may be the policy of permitting actions of this kind to be maintained, no ground has been shewn for a court of equity to interfere. If there be any ground to prevent this action from proceeding, it is of a legal rather than an equitable nature. If the effect of the act of confiscation in *Georgia* be, as it is contended, to exempt persons, whose fortunes were confiscated, from being sued in *England*, it is a subject for the cognizance of a court of law. But in truth it is neither a defence at law or in equity. There is no analogy between this case, and that of a certificated bankrupt, in which the law expressly declares that the bankrupt shall be free; the mere depriving him of all his property, would not of itself prevent him from being sued. The states of *America* have indeed confiscated property, but they have not said that those persons to whom the property belonged, should not be sued, nor is there any reason to suppose that such was their meaning. It has been said, that it would be hard to sue a person whose whole property is taken from him; but the taking the property does not import an exemption from being sued. An attainted person, though all his property is confiscated, is capable of being sued. Supposing the act of confiscation had expressly said, that it should operate as a discharge of *English* creditors, yet if Sir *James Wright* had gone to *France*, and been sued by a *French* creditor, there is no principle in the law of nations to prevent such creditor from recovering. Unless it can be shewn, that the contract was undone in *America*, it may be enforced in *England*. When the justice of this country required the property of the *South-Sea* directors to be taken from them, it also required that from that property their debts should be paid: a creditor sued one of them, who applied to this court to interpose, on the ground that his property was taken from him, and therefore he was discharged; but the court held, that this was no discharge, and refused an injunction. *Houlditch v. Mist*, 1 P. Wms. 695.

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The argument drawn from the reciprocal benefit of executing contracts in one country, which are made in another, is not applicable to the present case, which is not that of a general prohibition of the subjects of *Great Britain* to sue in *America*, but only of certain attainted persons, and does not prevent the operation of the general principle, that personal contracts may be sued in any country. The plaintiff ought to have shewn, according to his own argument, that Sir *James Wright* was in fact deprived of all his property, which has not been done. Where there are many sureties for a debt, if one of them should lose all his property, it could be no reason to induce this court to prevent the creditor from having his choice to which of them he would resort for payment: the surety who had been deprived of his property would still remain liable. As to the argument, that this debt might have been satisfied in *Georgia*, it is not to be conceived, that for the sake of gratifying private pique or malignity, *Pinkney* should purposely omit to receive payment of a large debt. Neither is it probable, that the representative of Sir *James Wright*, in this country, is ignorant, or at least, that he has not had the means of knowing whether this debt has been really paid in *America* or not. There is no ground, therefore, in equity, to delay the creditor any longer in respect of *Pinkney's* answer, after the delays already put in practice in the course of the action at law. Whatever may be the case with *Pinkney*, *Nutt* sues here in his own right, and in the usual way of compelling payment of a debt due to him. But if an injunction should be thought proper to be granted till *Pinkney's* answer shall come in, it must be, in reason, on condition of bringing the money into court.

LORD CHANCELLOR.—I am glad this application happens to be made when I have his *Honour's* assistance, because there are circumstances in the case somewhat particular, though I do not take the general principle upon which it must be decided to be altogether new. Great part of the argument has spent itself in this question, Whether the laws of the country, to which the creditor belongs, have or have not disabled him from suing in this country?—I think the first answer which was given to that was the shortest and the best, that is to say, if he be disabled from suing, this is not the court to say so; but that it ought to have been argued before the court in which the action depended, and there it would have been decided. I likewise lay

out

out of the case, all observations that relate to hardship, either upon one side or the other. It may be a question for private speculation, Whether such a law made in *Georgia*, was a wise or an improvident one, whether a barbarous or uncivilized institution? But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in courts of justice here, whether, in private speculation, they are wise or foolish. Nor does it at all apply in my judgment, whether Sir *James Wright* was or was not capable of paying; for the case would have stood before me precisely in the same situation, if he had been worth 100,000*l.* and had been sued in the way in which he now is sued; as a man I might feel differently about it, and compassion might interpose; but as a judge it would be impossible for me to determine on that ground. Nor can I take into consideration, how very much it bears with it an approach to fraud. The circumstance of converting the charity of this country to individuals ruined in its service, to the purpose of paying the creditors of those individuals in the other country, is a consideration which should have belonged to those who thought proper to offer them that charity, and the terms upon which it was afforded, should have been regulated accordingly. It is nothing to me, in short, what the situation of the parties is, but I must consider the plaintiff as competent to bring this action at law, and the defendant as coming here to state, if he can, some equitable ground upon which such action ought not to be permitted to proceed. The equitable ground which he has stated differs from all others that I know of, that have yet come before the court, unless there be more similitude between this and the case of *Houlditch v. Mift*, than the short state of the latter case affords.—The circumstances upon which this case comes before the court, are these: that Sir *James Wright*, a banished man, disabled to act or to sue in *America*, had all his property taken away from him: and the terms upon which it was taken away were, that it should be applicable in the first place to the payment of his debts contracted in that country; no doubt has been made on either side, that the debt sued for at law here was of that description, and capable of being made the subject of a claim upon his estate in that country: under that circumstance, instead of a claim being made there, (as is suggested by the bill,) an action is brought here. There is no doubt in the world, but that according to

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the general principles of a court of equity, where a man who has not actual possession of his debt, (for if he had actual possession, I should conceive, that it would be payment even that might be available in a court of law, but if not so at law, it would at least in a court of equity, be considered as actual payment, and that a man was vexed twice for the same demand upon some formal difficulty of making the fact of payment available at law,) but has the power of paying the debt depending upon his own act, whether he will resort to a particular fund or not, if instead of making use of that power, he will pursue the debtor, it would be too much for a court of equity to permit him to sue the person, and relinquish the exercise of that power which he has at the time in his own hands. This case is attended with a circumstance still more peculiar, which is, that it is totally impossible for him to assign over that right to the party debtor here, in order for him to make it available: it is clear, that neither the hazard, the difficulty, nor the expence of making the demand, ought to be thrown upon the creditor: in point of natural justice they ought to be upon the debtor, provided the creditor can put the debtor into a situation to make it as effectual for him, as it would be for the creditor himself. But here the creditor cannot clothe the debtor with the same remedy as he himself is in possession of; and therefore the question is, Whether, while he holds that remedy in his hands, the court does not proceed upon principles of natural justice, (applied by fair analogy to other cases, or if such other cases had not existed, applied by the reason of the thing, and the force of those principles of natural justice, to this case,) when it says to a creditor, who makes such a demand in a court of law, "You shall not proceed upon that demand, till you have satisfied me that you have taken all the pains you can to make that other pledge you have thus in your hands, (I call it a pledge by metaphor, for I do not mean to state it effectually as a pledge,) as effectual and available to yourself as you possibly can." Under circumstances so stated, this court would proceed according to the clearest notions of distributive justice, and the fairest principles of natural equity, if it said to a creditor so circumstanced, you shall proceed to make that available, and you shall demonstrate to me that you have proceeded to make it available *bonâ fide*, and that you have, neither for the fraudulent purpose of obtaining double satisfaction, nor the mal-

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lignant purpose of plaguing your debtor, made your claim in this country. I wish to be understood clearly upon this point, that this is the utmost extent to which my judgment goes upon the subject. When this subject was introduced into the House of Lords, I had occasion to give my opinion upon it there, but more particularly in private, to those who brought in the bill, with the clearest motives in the world, with a great deal of public spirit and public wisdom: although other motives arose, which rendered that project indiscreet and impolitic, and consequently it was not carried into execution as a legislative act; yet, then, and at all times, it has constantly struck me with wonder, that principles, such as I have just stated, should not have been regarded, from the moment the question arose, as fit to be tried in courts of justice, for the purpose of bringing these demands to what I think is their proper test. I am therefore clearly of opinion, that provided a case is made, by which it appears, that there is in the hands of a creditor, either possession of the estate in fact, or the clear means of effecting that possession, he ought to be called on so to do, or at least the court should interfere. When I have stated that to be my opinion, I confess that thinking much of the case of *Houlditch v. Miffl*, I do not know exactly how to reconcile the decision of that case with the principles I have now laid down. The only way I have to deal with it, is to avoid it. From the book nothing more appears, but that a bill was filed by the debtor, stating that he had been one of the directors of the *South-Sea* company; that by an act of parliament his whole fortune had been confiscated, and therefore an absolute disability of paying his debts had been incurred; that it was contrary to reason, and natural justice, that he should be called on to pay his debts, under the circumstances of such an act of parliament. No more is stated upon the subject, yet it is clear, that the debts of these directors were capable of being paid out of the fund: it also appears, by a memorandum which is added to the bottom of that case, that by compromise, the debt was directed to be paid out of that part of the fund which, by some regulation of the act, appears to have been given to the private persons of the directors themselves. If there were a doubt about that, or if my opinion turned upon it, it should be a little more enquired into; but I collect, that beyond the payment of the debts, and the confiscation, there was

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1789: a personal allowance made to those who suffered. Stating the case in that manner, thus much seems fairly to be inferred from it, namely, that it did not occur at that time to insist that the debt should not be paid out of the fund which was the personal fund of the delinquent; and which, according to my principles, ought to have been the last fund appropriated to the payment of the debts. I wonder much at that, and it brings the case less to apply, because under such an act passed in this country, an act of partial confiscation, qualified in the manner in which it was, *Houlditch* had as good a right to insist upon being relieved of that debt, out of the fund, as any other man: he did not lose all his rights as a citizen: all he lost, was the fund that was confiscated. There must, therefore, have been a great deal more in that cause than appears upon the report; for it seems impossible to imagine that the debt was not to be forthcoming, in some manner or other, out of the fund; and if there were allowances made, to say that the justice of the case was satisfied, by making those allowances liable to those debts. *Houlditch* was not in the miserable situation in which these people are, deprived of all their rights. I do not therefore know how to apply that case to the present; but I retain the opinion I gave before, namely, that a creditor will be bound by an application to this court, to use fair *bonâ fide* diligence in order to make the most of his debtor's estate in the place where the law of the country has applied that estate to the payment of his debts. I do not think that this law of *Georgia* meant any mercy to the debtors; the provision was that of pure policy. But whatever the object and intent of the law might be, I am clearly of opinion, that natural justice requires we should see the utmost made that can be made of that matter. Now, what does this case amount to? This is a debt, as it comes before us, sued by the administrator of *Brewton*, who has claimed and obtained letters of administration upon a double right. He has stated, and it is recorded in the letters of administration, that he is a creditor of *Brewton's*, to the amount of 1400*l.*, he is also stated to be the attorney of the executor of *Brewton*, and in that right entitled to the probate; he could not gain the probate as a creditor without the renunciation of the executor, he was therefore obliged to take it up as a temporary administration, subject to the general right of the executor,

tor, to come in for a general representation of all the effects of the testator. That executor, therefore, is the person who is generally interested in, and entitled to all the testator's effects; the administrator is only entitled to the temporary interest. In this situation he brings his action at law. The bill has been filed against him, and also against the executor himself, in whom the principal representation of the testator's estate is vested: (it cannot indeed be so in our contemplation, till the probate of the will is effectually granted to him, but substantially it resides with him). This bill is therefore brought against them, 1st, in respect of the formal title of the plaintiff at law. 2dly, In respect of the substantial title of the executor, who has a right to make it available whenever he thinks proper. In the course of this action all the passages have intervened which have been mentioned, and which, whether they arose from the uncertainty that belonged to a new case, from the difficulty the parties had in procuring advice, in proceeding upon certain advice, or in their choice of remedies which the speculations of those they consulted, thought proper to offer them, have been attended with these positive mischiefs; that a man who has a clear demand, has been delayed for three or four years together, by various shifts in the courts of law; and at length a bill in equity is filed to restrain his proceeding there at all. In order to make a good and effectual bar in equity to a demand at law, it will be necessary to shew, that the estate of Sir *James Wright* confiscated in *America*, was of a greater value, not only than the sum now in question, but than all sums claimed upon that estate, consequently that there was a fund sufficient to have paid the whole; for if it should turn out to be a defective fund, and capable of satisfying the debt but in part, it can only operate as a discharge *pro tanto*. In the second place, it must be shewn, that by the justice to be obtained in that country, this demand was competently made; for let what will be the faults of their judicature, I can hear no complaints of them: I must understand them to be deciding according to the laws of that country, whatever my private opinion may be: and therefore, if a formal and final decision had been obtained, by which it became impossible to have obtained a shilling of the whole of that demand, that would likewise be a sufficient answer; for the bill proceeds upon the idea that the fund was complete, and that it is still available; or if not so, that it has been owing to the conduct of the other party.

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1789. party. I agree that as this case is circumstanced, if you had come recently, you might have stated all the actual circumstances of Sir James Wright, all that you know of the proceedings that have obtained in *America*, and the probable evidence of them : upon that, it would have been competent for the court to have taken the step now demanded, which is an injunction ; till the answer of *Pinkney* came in. But I confess, after making all allowances for the circumstances that have been pleaded, I think it tends to a dangerous example, to say that a party who is sued in 1784, or 1785, should come in 1788 to ask for the answer from the party abroad, instead of applying for it before, which he ought to have done. He should have made a proper application by affidavit, and then the action would have been stopped, till the answer of the party abroad came in. But considering he has staid so long before any application was made, I have great doubts about stopping this action upon any other terms, than upon bringing the debt into court.

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Master of the Rolls, Sir LLOYD KENYON.—Upon the general points of the case, I cannot hope to add to what my Lord Chancellor has said ; I can only express my full concurrence with every part of what has fallen from his lordship. The great point will be discussed, when the whole is before the court, upon the coming in of *Pinkney's* answer. It is in vain to say the cause does not stand precisely upon the grounds upon which it would do if *Pinkney* were the plaintiff in the action at law. Some argument has been used to shew that *Nutt* stands in his own independent situation, suing for his own debt, having a right to retain, if recovered, this money from debtors of an inferior nature. He comes here clothed merely (in the view of this court) with the character of the agent of *Pinkney*, in order that he may put in force the authority with which *Pinkney* armed him. He has obtained another formal legal character, namely, that of an administrator here, because otherwise he could not have proceeded to recover the debt ; but in effect he is still to be considered as the person litigating on the part of *Pinkney* : when assets get into his hands he will be considered as having them in the character, not of the administrator of *Brewton*, but of the attorney for *Pinkney* : *Nutt* would not be entitled to retain as *Pinkney* would in case of a creditor of equal degree : then it is not essential to the interest of justice, that the parties should know from *Pinkney*, whether he has proceeded

bank

bonâ fide, as far as he can, to receive payment of this demand out of that fund, which ought to be the primary fund to discharge it, or indeed, whether he has not actually obtained payment? For the bill suggests, that he has or might have obtained payment; now it is essential that these facts should be known, from the only person who knows what they are. I am therefore clearly of opinion, that the injunction ought to be granted; whether upon the condition of bringing in the money, or not, depends upon the circumstances of the argument which impute laches to Sir *James Wright's* executors. They ought to have taken the earliest methods in order to repel this demand, but as they have kept the party at arm's length, by using delays, I think the terms my Lord *Chancellor* has imposed, are fit to be imposed upon by them; namely, that they should bring the money into court (a).

(a) *Pinkney's* answer afterwards came in, but contained nothing to induce the court to order the injunction to be dissolved.

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KILGOUR v. FINLYSON, GALBREATH, and HARPER.

Wednesday,
Feb 11th.

INDORSEE against the ostensible indorsers, who also appeared to be the drawers of a bill of exchange. Money paid, money had and received, account stated. Verdict for the plaintiff.

The circumstances of this case were as follow:

The plaintiff was a warehouseman and factor, the defendants were also warehousemen and factors in partnership from *Midsummer* 1785, to the 28th of *July* 1787, when the partnership was dissolved, and notice of the dissolution given in the *Gazette* as under,

" Notice is hereby given, that the copartnership between
" *Thomas Finlyson, Thomas Galbreath, and Henry William Har-*
" *per, of Bow church-yard, warehouseman, under the firm*
" *of Finlyson, Galbreath, and Harper, and also at Glasgow un-*
" *der the firm of Henry William Harper and company, was by*
" *mutual consent dissolved this day; all demands upon the*

tion: so that the indorsee cannot maintain an action on the bill against *A, B. and C.* as partners. Neither can such indorsee maintain an action against them for money paid to the use of the partnership, though in point of fact the money raised by discounting a note which he had given (in discounting the bill), be applied by *A.* to the payment of a debt due from the partnership.

On the dissolution of a partnership between *A, B. and C.* a power given to *A.* to receive all debts owing to, and pay those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership, after the dissolution.

" above

1789. "above firm will be paid by Thomas Finlyson of Bow church yard,
 "who is impowered to receive and discharge all debts due to the said
 KILGOUR v. "co-partnership."
 FINLYSON.

Witness our hands, this 28th day of July 1787,

Thomas Finlyson,
 Thomas Galbreath,
 Henry William Harper.

At the time of the above dissolution one Scott was indebted to the partnership in 758*l.* and the partnership indebted to Sterling Douglas and Co. in 890*l.* On the 21st of September, 1787 Finlyson drew the bill in question in the name of the late partnership on Scott, payable on the 23d of November following for 304*l.* 2*s.*, which Scott accepted. On the 9th of October Finlyson indorsed it, in the name of the partnership, to the plaintiff, who discounted it, by giving his own promissory note for 304*l.* 3*s.* 6*d.* payable on the 25th of November, (the difference of 1*s.* 6*d.* being on account of the note being due two days later than the bill). This note of the plaintiff's was indorsed by Finlyson to Sterling Douglas and Co. who discounted it, and received the money they had advanced by so discounting the note, back again from Finlyson, in part of payment of the debt owing to them from the partnership. When the note became due the plaintiff paid it to Sterling Douglas and Co. Two days before Scott's bill became due Finlyson took it up, and gave in lieu of it another bill to the plaintiff, accepted by Lee, Strachan, and Co., but did not take back Scott's bill. Afterwards Lee, Strachan, and Co.'s bill not being paid, and Finlyson having become a bankrupt, the plaintiff brought this action against all the partners on Scott's bill, which remained in his hands, and obtained a verdict.

A rule being granted to shew cause why this verdict should not be set aside, and a new trial granted,

Adair and Bond, Serjts. shewed cause. They acknowledged that the action on the bill could not be supported, but contended that the plaintiff was entitled to retain his verdict, having paid money to the use of the defendants, at the special instance and request of a person authorised by them to receive and pay their debts.

Le Blanc and Lawrence, Serjts. for the rule argued, that it ought to have been shewn, that the money was actually paid
 in

in discharge of a partnership debt; if it were paid, when *Finlyson* had no right to pledge the credit of the partnership, it was not paid to the use of the partnership. But admitting that it was paid for a partnership debt, yet being paid without the knowledge and request of the defendants it could not be sufficient to raise an assumpsit. *Finlyson* had no authority to borrow money to pay their debt, or to contract for them without their consent. This case must be considered as already decided by *Lord Kenyon* in the (a) king's bench.

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Adair replied, that in the case cited it was only holden that an action could not be maintained on the bill of exchange. The reason of which was, that the bill being negotiable, and going into the hands of persons who might not know the consideration for which it was given, must be binding when given, or not at all. The authority of the drawer must be independent of any application of the money. But no such inconvenience could arise from the action for money paid. It is admitted that *Finlyson* paid the money of the plaintiff in discharge of a partnership debt; he had full authority from the other defendants to receive and pay: he therefore applied to the plaintiff for his note at their special instance and request.

LORD LOUGHBOROUGH.—I was of opinion at the trial, that there was an equity in favour of the plaintiff, the money arising from his note being *de facto* applied for the benefit of the partnership, and the authority from the other partners giving him power to discharge their debts. But I am now convinced that I was mistaken. Consider the nature of this transaction: *Finlyson* applies to *Kilgour* to discount the bill accepted by *Scott*, and in part of the discount takes a promissory note from him; *Kilgour*, before *Scott's* bill became due, changes it with *Finlyson* for another, accepted by *Lee, Strachan*, and Co., returns that, and takes *Scott's* bill back again. Now all this was carried on, without any idea of the former partners being bound by it. On the 10th of *October*, long before the plaintiff's note was due, the defendant applied to *Sterling Douglas* and Co. to discount it, who accordingly did discount it, but received the

(a) In a case between the bank of *England* plaintiffs and the same defendants, in which the circumstances were the same as the present; there was a demurrer to the evidence which was not argued in court, but *Lord Kenyon* at the trial gave it as his opinion, that the action on the bill could not be maintained.

money

1789. money back again in part of payment of their debt owing from the partnership. When this note became due the plaintiff paid it to *Sterling Douglas and Co.*, but at that time no debt was owing to them from the partnership; the payment therefore of the plaintiff was not a payment to the use of the partnership. Though the money raised by discounting his note before it was due, was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by *Finlyson*.

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(a) HEATH and WILSON Justices, of the same opinion.

Rule absolute for a new trial.

(a) Mr. Justice Gould being absent.

Thursday,
Feb. 12th.

SHIELLS and THORNE, Assignees of GOODWIN a Bankrupt v. BLACKBURNE.

A. a general merchant undertakes voluntarily, and without reward, to enter a parcel of goods of *B.* together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. *A.* (having taken the same care of the goods of *B.* as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken) is not liable to an action for the loss occasioned to *B.*

THE material facts of this case were as follow. The defendant, who was a general merchant in *London*, having received orders from his correspondent in *Madeira* to send thither a quantity of leather cut out for shoes and boots, employed *Goodwin* the bankrupt, who was a shoemaker, to execute the order. *Goodwin* accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather on his own account, which he packed in a separate case, to be sent to *Madeira* on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels; and he, in order to save the expence and trouble of a separate entry at the custom-house, voluntarily and without any compensation, by agreement with *Goodwin*, made one entry of both the cases, but did it under the denomination of *wrought leather*, instead of *dressed leather*, which it ought to have been. In consequence of this mistake in the entry, the two cases were seized, and this action was brought by the assignees of *Goodwin*, to recover the value of the leather which he had prepared to export on his own account. The declaration stated, that the bankrupt before his bankruptcy was possessed of a quantity of leather, which he

designed

designed to export to the island of *Madeira*, for which purpose it was necessary that a proper entry of it should be made at the custom-house; that the defendant, in consideration that the bankrupt would permit him to enter the said leather at the custom-house, undertook to enter it under a right denomination; that the bankrupt confiding in the undertaking of the defendant, did permit him to enter it at the custom-house for exportation: that the defendant did not enter it under a right denomination, but on the contrary, made an entry of it under a wrong denomination, of *wrought leather*, in order *improperly to obtain a bounty* (a) thereon; by means of which wrong entry, the leather became liable to be seized, and was seized and forfeited to the king. 2d. Count goods sold and delivered. 3d. *Quantum meruit*. Plea general issue, verdict for the plaintiff.

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 v.
 BLACK-
 BURNES.

A rule was obtained to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds that the defendant not professing the business of entering goods at the custom-house, having undertaken to enter those in question without reward, and having taken the same care of them as of his own, was not liable for the loss.

Adair, Serjt. shewed cause, contending, that as the bills of parcels were left at the defendant's house, he must have known the proper denomination of the goods. It was no excuse for him that he lost some of his own goods by the same mistake in the entry; for though a bailee of goods may, if he pleases, throw away his own, yet he has no right to do so with those of another. Having by gross negligence lost the property of another, committed to his care, he is not exculpated by having lost his own property by the same negligence. Though in this case perhaps there was no intention to cheat the revenue, yet the tendency of it was to gain a drawback on exportation; whatever might be the intent, the effect was the same. The defendant was not a mere depositary, but undertook to perform a specific act. Though an action might not lie for non-feasance, it clearly would for a mis-feasance. This is agreeable to Lord *Holt's* doctrine in the case of *Coggs v. Bernard* (b), and answers to

(a) By *Stat. 12 Anne, Stat. 2. c. 9. s. 64.* a drawback is allowed of three halfpence on every pound weight of leather exported, which shall be *manufactured, and actually made into goods and wares.* Made perpetual by 3 *Geo. 1. c. 7.*

(b) 2 Lord *Rym. 99.*

1789. the *Mandatum* of the Roman law, recognized in his sixth division of bailments, though somewhat improperly termed a commission; which in common acceptation, implies hire or reward. Admitting that a bailor is not entitled to recover for a loss occasioned by his own folly in employing an unskilful person, where technical knowledge is required; yet here the defendant was a general merchant, used to exportation, and was to be presumed to know the proper duties payable at the custom-house. In *Jones' Law of Bailments*, 120, it is said conformably to Lord Holt's rule, that "a mandatary to perform a work is bound to use a degree of diligence adequate to the performance of it."

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Lawrence, Serjt. *contra*. The question is, how far the undertaking of the defendant extended? *Goodwin* the bankrupt having goods to export, the defendant voluntarily offered to enter them at the custom-house. Here the implied contract was the point to be considered. In *Coggs v. Bernard*, special care was required in removing a cask of brandy; in that case Mr. Justice Powell held that the special undertaking of the party was the gist of the action. Here the undertaking of the defendant was only to take the same care of the plaintiff's goods as of his own: no more can be implied. *Jones* in his *Essay on Bailments* (a) says, "if the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct. If more therefore than good faith were exacted from such a person, that is, if he were to be made answerable for less than gross neglect, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired." It is said in *Paley's Principles of Moral and Political Philosophy* (b), that "whoever undertakes another man's business makes it his own, that is, promises to employ upon it the same care, attention, and diligence, that he would do if it were actually his own, for he knows that the business was committed to him with that expectation, and with no more than this." Lord Holt's reasons in *Coggs v. Bernard*, for making a *Mandatary* liable, do not apply to this case; those are, that "in such a case a neglect is a deceit to the bailor: for

(a) Page 130.

(b) Page 144.

"when

"when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him: and a breach of trust undertaken voluntarily will be good ground of an action." Where a person professes himself to be of a certain business, trade, or profession, and undertakes to perform an act, which relates to his particular employment, there an extraordinary degree of skill and diligence is required from him; but where his undertaking is merely to take the same care of the concerns of another, as of his own, no more can be expected from him. *Puff. lib. 5. c. 4. s. 3. Moore v. Morgue, Cowp. 480. (a)*, in which Lord Mansfield's direction to the jury is in favour of the present defendant.

Adair replied, that Lord Mansfield's doctrine in *Moore v. Morgue* was not applicable to the present case, because the entering goods under a false denomination was gross negligence.

(b) HEATH, J.—The defendant in this case was not guilty either of gross negligence or fraud; he acted *bona fide*. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook *gratis* to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action.

WILSON, J.—Where money has been paid for the performance of certain acts, the person receiving it, is by law answerable for any degree of neglect on his part; the payment of money being a sort of insurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is gratuitous, and the party has acted *bona fide*, it is not consistent either with the spirit or policy of the law, to make him liable to an action. Here *Goodwin* wanted to dis-

(a) This case was mentioned by Mr. Justice Wilson, when the rule to show cause was granted.

(b) Mr. Justice Gould was absent.

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pose of his goods, which the defendant entered together with his own, without any reward. Could he be understood to be answerable for more care than he took of his own goods? There was no suspicion of any fraudulent design. A wrong entry at the Custom-house cannot be considered as gross negligence, when, from the variety of laws relating to the customs, reliance must be placed on the clerks in the offices. It happened, indeed, not long since, that a man, designing to export wool under the late act (a), applied to a clerk in the Custom-house to make a proper entry of it, who, not understanding the act of parliament, entered it wrong, and the goods were seized: when, therefore, such cases happen, it is too much to infer gross negligence from the mistake which the defendant committed.

Lord LOUGHBOROUGH—I agree with Sir *William Jones*, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the Custom-house, such a mistake as this is not to be imputed to him as gross negligence.

Rule absolute for a new trial.

(a) 28 *Geo. 3. c. 38.*

Thursday,
Feb. 12th.

WYVILL, Clerk, v. SHEPHERD.

In an action for an amercement in a court-leet, if the declaration state the court to have been holden before the

steward of the manor, and the evidence proves it to have been

DEBT for an amercement in a court-leet. The declaration stated the amercement to have been affixed at a court holden before the *steward* of the manor; but it appeared in evidence, that the court was really holden before the *deputy steward*, who was appointed by letter of attorney from the *steward*.

Mr. Justice *Grose*, who tried the cause, thought this was a fatal variance, and therefore nonsuited the plaintiff.

held before the *deputy steward*, it is a material variance.

A rule

A rule was obtained to shew cause why the nonsuit should not be set aside, and a new trial granted, against which, in *Michaelmas* term last, 1789.

Lawrence, Serjt. shewed cause. He allowed that a trifling variance would not vitiate where the substance of the allegation was proved; as where a declaration (a) was for maliciously indicting at the *General Quarter Sessions*, and it was proved to have been at the *General Sessions*, the word *Quarter* was held to be surplusage. But he contended that this was a material variance; a custom for a lord to hold courts before his steward not extending to the steward's appointing a deputy. The office of steward of a leet was judicial; by the antient common law (b), he had jurisdiction of felonies: a deputy then could not be appointed without either an established usage or special authority for that purpose, such as corporations and others exercise by virtue of particular grants. 4 *Inst.* 88. If the declaration had stated the court to have been holden before a deputy, without shewing an authority to appoint such deputy, it would have been bad on demurrer. The case of *Gery v. Wheatley* (c) proves that the courts consider variances of this kind to be material.

Cockell, Serjt. in behalf of the rule, urged, that the court-leet might be holden either before the principal or deputy. Though the deputy was not the same to every purpose as the principal, yet he was so in law as to holding courts. 12 *Mod.* 470. & 590. 1 *Ld. Raym.* 660. *Salk.* 95. The substance of the question was, Whether the court were legally holden? The matter of appointment was not in dispute; it was sufficient if the person before whom the court was holden was competent to hold it, and the court itself competent to amerce. If therefore it were a variance, it was not a material one. *Cro. Jac.* 32. *Yelv.* 46. 2 *Blackst.* 840—1050. *Term Rep. B. R.* 235. *King v. Pippet*, and the cases there cited.

The court seemed to have but little doubt of the variance

(a) 2 *Black.* 1050.

(b) See *Mag. Cb. c. 17.*—13 *Ed. 1. c. 13.*—1 *Ed. 3. c. 17.*—1 *Ed. 4. c. 2.*—11 *Hen. 7. c. 17.*—2 *Inst.* 387.—3 *Burr.* 1860.

(c) *Gery v. Wheatley*, tried before Lord Mansfield at *Westminster*, at the Sittings after *Michaelmas* term, 1777.

Debt for an amercement. The declaration stated that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons was to serve on the jury of the court-leet only.

LORD MANSFIELD said, this was a matter of strict law, it being an action for a penalty. The plaintiff having stated in his declaration, that the defendant was summoned to serve on the jury of the court-leet and court-baron, was bound to prove that averment, and as the summons did not prove it, must be nonsuited.

1789. being fatal, but said, as the point was of consequence to lords of manors, if the counsel for the plaintiff could produce any farther authorities in support of the rule, he should be heard.

WYVILL
SHEPHERD.

On this day *Cockell* said, that he had not been able to find any other case in his favour, and therefore the

Rule was discharged.

Tuesday.
Feb. 12th.

BRYMER, NEWTON, and THOMPSON, v. ATKINS and WHITE.

By the 14th section of the Stat. 16 G. 3. c. 5. (made to prohibit all trade and intercourse with the then American colonies, and since repealed) it was provided, where ships, &c. had been taken from the Americans, and condemned as lawful prize in a court of admiralty, and the sentence of condemnation appealed from

PROHIBITION to the court of lords commissioners of appeals from the Admiralty in prize causes.

The declaration stated, that all and all manner of pleas, of and concerning the validity, explanation, interpretation, construction, or exposition of the laws and statutes of this realm, and the cognizance of such pleas, belong and appertain to the lord the king and his royal crown, and by the common law, in the courts of our said lord the king of record, ought and have always been accustomed to be tried and discussed, and not in any court proceeding by any law differing from the common law of this realm.

That the said lord the king, did, in the second year of his reign, by his commission nominate, constitute, ordain, and appoint, all and every of his privy counsellors for the time being, and others therein named, or any three or more of them, to be his commissioners for receiving, hearing, and determining of appeals from the said lord the king's courts of Admiralty in matters of prize.

That the said courts of Admiralty, and the said commissioners of appeals, proceed by some law differing from the common law of this realm, and therefore have no power or authority, to try or discuss the validity, explanation, interpretation, construction, or exposition of any act or acts of parliament, nor to expound them otherwise than is warranted and allowed by the common law aforesaid.

“ party or parties appellate should give sufficient security, to be approved of by the court in which such sentence should be given, to restore the ship, &c. concerning which such sentence should be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from should be reversed.” Though the security taken by virtue of this section, in a court of Vice-Admiralty, was in the form of an acknowledgment of a debt to the king, yet being taken in a court not of record, it was not a strict recognizance, but operated as a stipulation by the parties to abide the decision of the court of Appeals. Neither was the court of Appeals bound by this section to interpret the words “full value” by any definite measure, but had a discretionary power of declaring what was the “full value,” and also a power of enforcing from the sureties payment of what it had declared to be the “full value.” [Affirmed in K. B. on a writ of error, Mich. 30 G. 3.]

That

That a statute was made in the sixteenth year of the reign of his present majesty, to prohibit all trade and intercourse with the then *American colonies* (*reciting the act particularly*). 1789.

That in the said statute it was, among other things, enacted, that the execution of any sentence so appealed from, as in and by the said act is directed, should not be suspended by reason of such appeal, in case the party or parties appellate *should give sufficient security, to be approved of by the court in which such sentence should be given*, to restore the ship, vessel, goods, or effects, concerning which such sentence should be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from should be reversed.

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That *Hugh Bromedge Esq.* commander of the said lord the king's sloop of war *The Savage*, in obedience to the orders of *Samuel Graves Esq.* commander in chief of his majesty's ships and vessels at the time hereinafter mentioned, employed in the river *St. Lawrence* and along the coast of *Nova Scotia*, the islands of *St. John* and *Cape Breton*, and thence to *Cape Florida* and the *Bahama Islands*, being then and there subject to, and under the command of the said *Samuel Graves*, as such commander in chief, did, on the 17th of *January* 1776, seize as prize, in the harbour of *Halifax*, in the province of *Nova Scotia* aforesaid, a certain ship or vessel called *The Nicholas*, *Nathaniel Atkins*, master, the property of certain persons inhabitants of the said colony of *Massachusetts Bay*.

That *William Nesbitt Esq.* his majesty's attorney-general for the said province of *Nova Scotia*, for and on behalf of the said lord the king and of the said *Hugh Bromedge*, did, on or about the 12th day of *April*, in the said year 1776, institute a suit in his majesty's court of Vice-Admiralty, at *Halifax* aforesaid, before the Worshipful *James Brenton Esq.* surrogate, and deputy of the Worshipful *Jonathan Sewell*, judge, deputy, and surrogate of the court of Vice-Admiralty of the province of *Nova Scotia* and the maritime parts thereof; and by the libel by him exhibited in the said suit, among other things, did propound, allege, and declare, that notwithstanding the said act of parliament of the sixteenth year of the reign of the said lord the king, the said *Nathaniel Atkins*, master of the said ship called *The Nicholas*, (*Thomas Beylson*, of *Boston*, in the province of *Massachusetts Bay*, merchant, aforesaid, or others

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residing in the said province, owners, being one of the rebellious colonies mentioned in the said act,) had been trading to *Russia* and other parts, and there loaded hemp, iron, and *Russia* linen, being partly naval stores, and proceeded from thence to *Great Britain*, and cleared out for *Halifax* in the said province, under pretence of carrying the said naval stores and other goods to some of the said rebellious colonies, where the owners of the said ship *Nicholas* and goods resided; and the said master, with the said ship *Nicholas*, with her cargo, having arrived at *Halifax* in the said month of *January* 1776, the said ship *Nicholas* was there with her cargo seized and detained by the said *Hugh Bromedge*, commander of the ship of war aforesaid, as being the property of persons in the said rebellious colonies; and did thereby, for the said lord the king and the said *Hugh Bromedge*, pray the said court to take the premises in the said libel alleged into consideration, and on due proof to proceed to adjudication, and that the said ship and cargo might be condemned as forfeited to the said lord the king, and that the same might be delivered over to the captor, pursuant and according to the directions of the said act of parliament.

That the said *Nathaniel Atkins* and *John White* were afterwards duly admitted in the said court of Vice-Admiralty, for and on behalf of themselves and other claimants of the said ship and cargo; and the said *James Brenton*, being surrogate and deputy as aforesaid, having deliberately and maturely heard the parties to the said suit, by their advocates and proctors, and their arguments and proofs, and having inquired into and duly considered of the whole proceedings in the said business, did, on the 8th day of *May*, in the said year 1776, pronounce, decree, and declare, that the said ship *Nicholas*, her tackle, apparel, furniture, and her cargo therein laden, were rightly and duly seized and taken by the said *Hugh Bromedge*; and that the said ship, her tackle, apparel, furniture, and cargo, were, at the time of the capture and seizure aforesaid, as far as appeared to him, in violation of the said statute of the sixteenth year of the reign of the said lord the king, and as such ought to be accounted liable and subject to confiscation, and to be adjudged and condemned as and for good and lawful prize, and did adjudge and condemn the said ship, her tackle, apparel, and furniture, and the cargo therein laden, as and for good and lawful prize, as being guilty of a breach and violation of the act aforesaid.

That the said ship or vessel, and the cargo therein laden, were, after the said sentence of condemnation, on the 15th day of May, in the year aforesaid, sold by the public vendue master, at public auction, to the best bidders, for the sum of 4897 l. 18 s. 10 d. current money of Halifax in Nova Scotia aforesaid, amounting to the sum of 4408 l. 3 s. lawful money of Great Britain, free and clear of all charges, being the utmost value of the same, at Halifax aforesaid.

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That the said Nathaniel Atkins and John White, in behalf of themselves and of Thomas Boylston and other claimants of the said ship or vessel, and the cargo therein laden, did interpose an appeal from the sentence of the said court of Vice-Admiralty to the said commissioners of appeals in matters of prize, whereupon the said Alexander Brymer, Henry Newton, and Alexander Thompson, did afterwards, to wit, on the 6th day of August, 1776, personally appear before the said James Brenton, surrogate and deputy as aforesaid, and acknowledged jointly and severally, that they owed to our sovereign lord the king the sum of 9795 l. 17 s. 8 d. of the current money of Halifax aforesaid, that is to say, exactly double the amount of the clear monies arising by the public sale as aforesaid, upon condition that the said Hugh Bromedge, the party appellate, his agent or attorney, should restore the said ship and her cargo, or the value thereof, to the said appellant or appellants in case the sentence so appealed from should be reversed.

That the said appeal was heard before the said commissioners upon the 18th of March, 1780, when the said commissioners were pleased to reverse the sentence of the said court of Vice-Admiralty, and decreed the said ship and cargo, or the value thereof, to be restored to the said appellants.

That the said Alexander Brymer, Henry Newton, and Alexander Thompson, afterwards, on the 15th day of March, 1781, for and in behalf of the said Hugh Bromedge, paid into the registry of the said commissioners the said sum of 4897 l. 18 s. 10 d. of the said current money, amounting to the said sum of 4408 l. 3 s. of lawful money of Great Britain, being the full value, and clear amount, of the monies arising from the public sale of the said ship and cargo as aforesaid.

That the said Nathaniel Atkins and John White, on behalf of themselves and the said other appellants, did receive and take out of the said registry, the said sum so paid into the said registry as aforesaid, but did refuse to receive the same in satisfaction of their said claim, as the full value of the said ship and cargo ;

1789. and did afterwards petition the said commissioners to order certain invoices and accounts of the said ship and cargo to be referred to the register of the said commissioners, for the purpose of finding, adjusting, settling, and liquidating the value of the said ship and cargo.

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That the said commissioners did according to the petition of the said *Nathaniel Atkins* and *John White*, refer to *Maurice Swabey*, Esq. one of their deputy registrars, the said invoices and accounts, and also the accounts of the sales of the said ship and cargo, signed by the said public vendue master, and certified under the hand of the deputy registrar of the court of Vice-Admiralty at Halifax aforesaid.

That the deputy registrar of the said commissioners did report, that the sum of 7708*l.* 17*s.* 3*d.* of lawful money of Great Britain, ought to be allowed and paid to the said *Nathaniel Atkins* and *John White*, in behalf of themselves and the other claimants of the said ship *The Nicholas*, and the said cargo; which report the said commissioners were pleased on the 31st day of January 1782, to confirm.

That monitions and other process having been sued out against the said *Hugh Bromedge*, to compel payment of the sum of 3455*l.* 3*s.* 6*d.* lawful money as aforesaid, over and besides the sum of 4408*l.* 3*s.* 6*d.* (a) paid into the registry of the said commissioners as aforesaid, the proper officers to the said commissioners returned, that the said *Hugh Bromedge* was not to be found.

That monitions having been thereupon prayed, and sued out against the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, the sureties of the said *Hugh Bromedge*, as aforesaid, an appearance was given to them by the said commissioners, to shew cause against the payment of the said sum of 3455*l.* 3*s.* 6*d.*

That on the 27th day of July 1785, the right honourable *Charles Earl Camden*, lord president of the council of the said lord the king, *Thomas Earl of Effingham*, and *Richard Lord Viscount Howe*, three of the said commissioners of appeals, for receiving, hearing, and determining appeals in prize causes, having heard informations by counsel, as well in behalf of the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, the parties cited and intimated in that behalf, as on the part of the said *Thomas Boylston*, the owner and proprietor of the said

(a) Query whether the excess of these two sums of 3455*l.* 3*s.* 6*d.* and 4408*l.* 3*s.* 6*d.* together, above the sum of 7708*l.* 17*s.* 3*d.* (reported by the deputy registrar as proper to be allowed,) did not arise from the costs awarded by the court of appeals?

ship and cargo, decreed to be restored by the interlocutory decree of the said commissioners, pronounced the recognizance, dated the 6th day of *August* 1776, and entered into by them the said *Alexander Brymer, Henry Newton, and Alexander Thompson*, in the said court of Vice-Admiralty, as *sureties to answer the said appeal* in the penal sum of 9795*l.* 17*s.* 8*d.* currency, to be forfeited, by reason that the aforesaid sentence appealed from, had been reversed, and that *Hugh Bromedge*, Esq. the party appellate, his agent, or attorney, had not restored the said ship or cargo, or the value thereof, agreeably to the said decree of restitution, and the condition of the said recognizance; and decreed a monition against the said *Alexander Brymer, Henry Newton, and Alexander Thompson*, to pay the sum of 3455*l.* 3*s.* 6*d.*, being the remainder of the value of the ship and cargo in question, according to the registrar's report, to the said *Thomas Boylston* or his lawful attorney.

That the said court of Vice-Admiralty had not any authority by the laws or statutes of this realm, to take any security of the nature, and in the terms therein before mentioned to have been entered into by the said *Alexander Brymer, Henry Newton, and Alexander Thompson*, nor had the said commissioners, by the laws and statutes aforesaid, any authority to enforce the same.

That the said commissioners have no power or authority whatsoever, under the statutes aforesaid, or any other statute or law of this realm, by reference of invoices and accounts, to registrars, or otherwise, to open, re-examine, set aside, or in any manner to alter the valuation of any ship or vessel, or goods and effects, so fixed, settled, adjusted, and liquidated, by public sale, after sentence of condemnation duly pronounced, where no fraud or collusion is alledged and proved.

That the said ship *Nicholas*, and the goods and effects on board the same, were condemned as lawful prize, by the said court of Vice-Admiralty at *Halifax*, as aforesaid; and sold by public auction, by the vendue master aforesaid, to the highest bidder, without any fraud or collusion having been alledged or proved.

That the practice of opening, re-examining, setting aside, and altering the valuation of ships or vessels, or goods and effects so fixed, settled, adjusted, and liquidated, as aforesaid, is attended with great oppression, vexation, and expence to the parties, and is contrary to the true meaning, intention, form and effect of the

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the said statute, and other the statutes and laws of the realm; yet the said Right Honourable *Charles Earl Camden*, Lord President of the Council of the said Lord the King, *Thomas Earl of Effingham*, and *Richard Lord Viscount Howe*, three of the said commissioners for receiving, hearing, and determining appeals in prize causes, not weighing the said laws and statutes of this realm, but contriving the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, to aggrieve and oppress, did as aforesaid decree the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, to pay the said *Thomas Boylston*, or his lawful attorney, the aforesaid sum of 3445*l.* 3*s.* 6*d.* over and besides the monies arising by the said public sale, paid into the said registry, as aforesaid; as the supposed remainder of the value of the said ship and cargo, according to the registrar's report; to the great contempt of the said Lord the King, and his laws, to the great and manifest damage, prejudice, and injury of the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, and against the form and effect of the said statute, and also against the laws and customs of this realm.

That although the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, afterwards, to wit, on the 27th day of *June* in the year of our Lord 1787, at *Westminster* aforesaid, delivered to the said *Nathaniel Atkins* and *John White*, the King's writ of prohibition, to the contrary; nevertheless the said *Nathaniel* and *John* have not ceased to prosecute their said suit before the said commissioners, but have since prosecuted, and still do prosecute the same there, against the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, to compel payment of the said 3455*l.* 3*s.* 6*d.* according to the said monition of the said *Charles Earl Camden*, *Thomas Earl of Effingham*, and *Richard Lord Viscount Howe*, against them the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, notwithstanding the said writ of prohibition to the contrary, so delivered to them as aforesaid; in contempt of his said Majesty, and to the great damage of the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, and against the prohibition aforesaid. Whereupon the said *Alexander Brymer*, *Henry Newton*, and *Alexander Thompson*, who as well, &c. say that they are injured, and have damage to the value of 100*l.*, and therefore, as well for the said Lord the King as for themselves, they bring suit, &c.—Demurrer, and Joinder.

This

This cause was argued in *Trinity* term last, by *Le Blanc* Serjt. for the defendants, and *Lawrence* Serjt. for the plaintiffs; a second time in *Michaelmas* term, by *Bond* Serjt. for the defendants, and *Adair* Serjt. for the plaintiffs, and in this term *Bond* replied to *Adair*. The arguments on behalf of the defendants, in support of the demurrer, were in substance as follow :

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The first ground of prohibition, stated in the declaration, is that the interpretation and construction of all statutes and acts of Parliament, belong to the courts of common law, and not to courts proceeding by different rules; that the court of appeals is a court proceeding by rules different from those of a court of common law, and has put a construction on the act in question, different from that which a court of common law would put upon it. Supposing this to be a good ground of prohibition, the first question is, Whether such a construction has been really put upon the act or not? In order to prove the affirmative of this question, the plaintiffs are obliged to couple the fifth section with the fourteenth (a): whether those two sections ought to be joined, will be seen by considering their respective objects. The fifth section provides for a case, where before condemnation of the ship, it shall appear necessary to the judge to delay the determination of the question, whether prize or no prize; in which case it directs, that the capture shall be appraised by persons named by the parties, and appointed by the court; and such of the goods as are perishable, (and therefore cannot, without manifest injury to both parties, be kept till the question of prize or no prize be determined,) shall be sold, and the rest put into proper custody to abide the event. After this is done, the first offer is to be made to the claimants, that if they will give sufficient security to the captors, according to that appraised value, they shall have the ship and cargo delivered to them. The reason of this is apparent, the *captor* having taken the ship and cargo, and brought them into a given place, cannot be entitled to a greater value than the amount of the sale at that place.

The fourteenth clause relates to a different subject; after the question of prize or no prize shall be determined, the party who may think himself aggrieved, may, if he pleases, appeal; but his appeal shall not prevent the sentence from being carried into

(a) *Vide post.* the material clauses of the several statutes, cited in this case.

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execution, provided the other party gives sufficient security to restore the ship and cargo, or the *full value thereof*, in case the sentence shall prove to be improper. Now it clearly appears that the legislature were aware of the difference between the "full value," generally speaking, and the "full value according to appraisement," and have accordingly expressed it in the sixth section, which is similar to the fifth, and directs, that in case the claimant shall refuse, then the captor is to give security to restore the full value "according to the appraisement." Where therefore the legislature meant to limit the value to the appraisement at the port into which the ship might be carried, they have expressly stated such intention; but in the fourteenth section, when they come to speak of the value after sentence is passed, and that sentence appealed from, they direct that execution shall not be delayed, if a security be given to restore the *full value*, generally. It is obvious, that there might be a material difference between the value in one case, and in the other. At common law, where goods have been wrongfully taken, the owner has a right to recover the true value, which a jury will not estimate, according to the price for which the taker shall think fit to sell them. Nothing done by a person who has taken goods illegally, can be the measure of the value to him from whom they were taken. So in the present case, after it has been determined that the capture was illegal, the claimant, perhaps the subject of a neutral power, has a right to be fully restored to his property: he is not to be restrained to the value at the place to which the captor shall think proper to carry it: it was carried there against his will, he was proceeding to another market, he had paid a great price for it; in justice, therefore, he ought to be restored to the real value of it, and not be forced to take less than the real value, because it was sold for less, at a place to which it was carried without his consent. Conformable to this, many cases have been decided in the courts of Admiralty: such as that of the *Bona Viaggia*, December 5th, 1780, in which the court of appeals decreed the ship and cargo to be restored, or the full value to be paid by the captor; it appearing that he had sold the goods for a price greater than their original value, which the claimant demanded, and was decreed to be paid him: the *Enigbeit*, *Schutz* master, a *Dutch* ship taken during the late war, in which the lords commissioners of appeals, on the 3d of May 1781, directed

rected restitution to be made according to the original invoices: the *Jacomb, Janson* master, the 20th of July 1781, in which the court of appeals directed the value of the cargo according to the invoice and account of sales, to be referred to the registrar, taking to his assistance two merchants: the *Tiger, Prince* master, the 26th of July 1782, where the lords of appeals decreed the value of the ship and cargo to be paid according to the special agreement between the parties, and a monition and attachment against the sureties: *The Charming Peggy*, the 8th of November 1782, in which also restitution of the value of the ship and goods was decreed. All these cases shew that the commissioners of appeals have enquired into the real value of captures, to estimate the compensation to be given; they have not been confined to any limits, but have gone into the general circumstances of the case, to determine the *quantum* of injury. There is no hardship in the 5th section, which orders, that before sentence the goods shall be appraised at the place to which they are carried, and the claimant, upon giving security to restore the appraised value, shall have his property back again, and proceed upon his voyage; because, if it be ultimately decided against him, the captor would receive the value at the place to which he chooses to carry the prize, and which is as much as a captor can have any right to expect. But it is not necessary to contend whether this would be just or unjust, since the act has made a positive provision that a security shall be taken to restore the *full value*, and has used this expression, where the legislature was perfectly aware of the distinction between *full value*, generally speaking, and value according to a *limited appraisement*. This being the case, there is no pretence to say, that the lords of appeals, after having determined the general question, namely, that this was not a legal capture, have construed the act in a manner different from the rules of the common law. They had a right to enquire what was the full value, by reference to the registrar, or by any other means they should think proper: whether the registrar has gone too far in estimating the value or not, is a question which this court cannot determine, since the lords of appeals had a right to make a reference to him, the subject matter being within their jurisdiction. The expences also of the capture and sale, if the act of the captor be declared illegal, ought to fall on him, and not on the claimant; allowance therefore should be made

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for those expences in estimating the value. Supposing then for a moment, that a construction different from the rules of the common law were a ground of prohibition, yet in this instance it does not appear that the construction put by the commissioners of appeals on the act in question, was contrary to those rules.

The next ground of prohibition stated, is, that the court of Vice-Admiralty at *Halifax* has taken a security which it had no right to take. Now, though a strict common law recognizance, upon which a *scire facias*, an action of debt, or an extent might be founded, could not be taken by a court of record, yet such a security as the present was well warranted by the 14th section of the act, which requires *sufficient security* to be given. Those only are strict recognizances, to which the plea of *nul tiel record* may be pleaded: but others of a similar nature may be proceeded upon, to which that plea cannot be applied. *Dougl. 1.* — Supposing antecedent to this statute, the courts of Admiralty had never taken such a security, yet the statute has given full licence to the discretion of those courts, to determine what species of security they would take, best adapted to the purpose of compensation to the party injured. If this form of security be not good, what other could be taken? It could not be a statute merchant, statute staple, or judgment; if it had been a bond, it could not have been put in suit in the court of Admiralty, as that court is prevented from holding plea of contracts under seal, by the statute 15 Ric. 2. c. 3. but it must have been enforced in a common law court; a jury must have decided on the *quantum* of damages, and the probable cause of seizure; by which means, the question of prize would have been drawn from its proper jurisdiction, and determined before a wrong tribunal. But no such inconvenience can arise from the security which has been taken, which is only to be enforced in that court which has jurisdiction of the merits, and comes nearest to the intention of the legislature. Neither can it be improper as taken to the king, though not in a court of record. In the disputes between the temporal courts and the courts of Admiralty in the year 1612 (a), the twelve judges agreed, that as the court of Admiralty was the king's court, the proceedings there ought to be in his name. It appears from the earliest accounts in the Admiralty, that the security in cases of prize has been taken to the sovereign; in 1628, letters of marque were granted to merchants, who gave security "to the King:" in 1651,

(a) *Vide 4 Inst. 134.*

to the "Keepers of the liberties of *England*;" in 1653, to "his Highness the Lord Protector;" in 1666, to "*James Duke of York, Lord High Admiral*;" from 1689 to 1697, to the "King, (*William 3.*)"; in 1702, to "*Prince George of Denmark, Lord High Admiral*;" in 1718, to the "King, (*George 1.*)"; in 1719, 1744, and 1756, to the "King, (*George 2.*)"; but in the late war, by mere mistake of the officers, in the Admiralty here, no name was mentioned to whom the parties should be bound, though in the Vice-Admiralty courts of *Halifax* and *New York* the security continued to be taken to the King. This was the antient form, and no possible inconvenience can arise from it. The term recognizance means, in its true signification, nothing more than an acknowledgment; applied to a court of record, it means an acknowledgment of a debt on record; in the present case, though an acknowledgment of a debt to the crown, it means no more in effect, than a stipulation, which a court of Admiralty may clearly take, and corresponds with the description given by (*a*) *Vinnius* of a stipulation. There is no substantial difference between an agreement to pay a sum of money, and an acknowledgment of a sum of money being due; they differ only in name. It would be quibbling on words, to say that a court shall be at liberty to take a stipulation, but not a recognizance, when in effect they are the same. There are many cases, in which this question has come before the courts of common law, upon suits instituted by the several part-owners of a ship, where they could not agree in sending it out; in which case, application has been made to the court of Admiralty, that the ship might be permitted to go out, notwithstanding the dissent of some of the owners, the party sending it out, giving security to those part-owners who were dissentient, to be answerable, in the event of a loss, for their respective shares. In these cases it has been a question, whether the courts of Admiralty, being governed by the rules of the civil

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(a) Lib. 3. c. 16. *De verborum obligationibus.*

In hæc, olim talia verba tradita fuerunt. Spondes? Spondeo: Promittis? Promitto: Fide jubes? Fide jubeo: Dabis? Dabo: Facies? Faciam. Utrum autem Latinâ an Græcâ, vel quâlibet aliâ linguâ, stipulatio concipiatur, nihil interest, si uterque stipulantium intellectum ejus linguæ habeat. Nec necesse est eadem linguâ utrumque uti, sed sufficit congruentè ad interrogata respondere. Quinetiam duo Græci, linguâ Latinâ obligationem contrahere possunt. Sed hæc solennia verba olim quidem in usu fuerunt: postea Leoniana constitutio lata est, quæ solennitate verborum sublata, sensum, et intellectum ab utraque parte solum desiderat, quibusque tandem verbis expressum.

law,

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This is an application to prohibit the court of lords commissioners of appeals, which is totally distinct from the ordinary court of Admiralty, and has alone jurisdiction of the subject matter. They are sole judges of the question, prize or no prize; this depends on the *jus belli*; upon which no other court can proceed: even after they have determined the question of prize in the negative, a court of common law cannot entertain an action of trespass on it: *Le Caux v. Eden, Dougl.* 594. in which case the opinions of Mr. Justice Buller and Mr. Justice Ashburst, shew that courts of Admiralty may give full compensation to parties injured.

The only remaining question is, Whether supposing the construction to be different from that which a court of common law would put upon the act, there is a good ground for a prohibition? Now, unless an inferior court is proceeding to enlarge its jurisdiction, by the construction of an act of parliament, a prohibition ought not to issue on that ground; here there was no encroachment of jurisdiction, the subject matter being peculiarly within it; and where there is cognizance of the principal, there is also cognizance of every incident. Upon the whole therefore it appears,

1st. That the statute in question has not been misconstrued, but that the construction put upon it is agreeable to the rules of the common law.

2dly,

2dly, That if the commissioners of appeals have differed in their interpretation of this statute from the common law, they have differed upon a subject which belongs exclusively to their cognizance, and in so doing have not encroached on the jurisdiction of any other court.

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3dly, That the court of Vice-Admiralty have taken such a security, as they were by law enabled to take, and therefore the lords commissioners of appeals are not to be prohibited by this court from enforcing it.

The following were the arguments used on the part of the plaintiffs.

In this case there are three questions, 1st, Whether the produce of the ship and cargo sold without fraud, at the port into which the prize was carried, be not the full value within the meaning of the 14th section of the act? 2d, Whether the court of Vice-Admiralty could take such a security as the present? 3d, Whether, supposing the act to have been misconstrued, a prohibition will not issue?

With respect to the construction of the act, it is to be observed, that the plaintiffs in prohibition are not the captors, but sureties, who have entered into a security to restore only what ought to be restored within the terms of the act, in case the sentence should be reversed. They are like bail at common law, who are not liable beyond the extent of their recognizance, whatever may be the damages. The principal design of the 5th section was, to prevent the detention of goods taken from the *Americans*, till proper evidence could be procured to enable the court to give final sentence; it therefore directs, that such as would not be injured by keeping, should be appraised and locked up, and such as could not well be kept, should be sold by public sale; for the clear amount of which alone, the captor should be answerable. Now in this case, as well as that of a reversal of that sentence, justice requires that the claimant should be put as near as possible, into that state, in which he was before the capture: to ascertain this, the legislature considered appraisement at the port to which the ship might be carried, as the best measure, with respect to such goods as could be kept; and public sale with respect to such as could not. They also considered the captor, in case sentence should be given in his favour, so likely to be in the right, that a provision is made by the 14th section, that the execution of the sentence shall not be suspended by means of an appeal. By the 5th section, before

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sentence, the goods are to be delivered in the first instance to the claimant, and on his refusal, by the 6th section, to the captor; but by the 14th, after sentence, the claimant is looked upon as so little likely to be in the right, that the goods are to be delivered to the captor, upon giving security to restore the "full value," in case the sentence shall be reversed. Now it is not to be conceived, that the legislature could mean to require security for a greater sum, from the captor, who had so far succeeded in establishing his right, as to have a sentence in his favour, than he would have been obliged to give, if no such sentence had been passed: to put him in a worse situation after the court of Vice-Admiralty had decided in his favour, than he would be in before such decision; to consider it more probable that he should be wrong, when a court of justice had determined him to be right, than when it had not; to make the lesser probability outweigh the greater. It has been said on the part of the defendants, that where goods are wrongfully taken, the jury are to measure the value of them; the owner is not to be bound by the sale of a wrong doer, because there would be a manifest injury, if he were obliged to receive no more than their produce at a bad market. But the same injury may happen to a claimant in the case provided for by the 5th section: the goods may be carried to a port, where there may be an improper market for them, and upon inquiry there may be no ground for a sentence of condemnation; yet the claimant, upon the court of Admiralty's deciding that his ship was not lawful prize, could recover back no more than the amount of the previous sale of such commodities as were of a perishable nature; he would then be in a more meritorious situation than if his ship and cargo had been condemned, and yet would be liable to the same hardship, which furnishes the arguments used by the defendants to prove that the words "full value," in the 14th section, cannot mean the value for which the goods might be sold at the port into which they might be carried. But in fact there is no complaint of injury on the libel, it is simply a question, whether prize or not. By the (a) 1st section of this act, all the ships, &c. of the rebellious colonies trading in *America* are declared to be forfeited to the king, as if they belonged to open enemies; the object of it was, to put the *Americans* in the light of open enemies;

(a) *See* pp. extracts from the general statutes referred to in the argument.

either

other prize acts therefore relating to open enemies, are in *pari materia*, and may be called in to explain the act in question; if the opinions of eminent lawyers be allowed to have weight in questions of construction, much more shall the voice of the legislature itself. In the 6th of *Anne*, c. 37. s. 4 & 5. from which act the others were copied, the same measure of value is adopted; the 8th section of that act is so much in favour of the captor, that in case of an appeal it makes no security necessary to be given for the restitution of the value of the capture, but entitles him to execution without any security. This being thought too great a latitude, the 13th *Geo.* 2. c. 4. s. 8. introduced a security for the "full value," in the same manner as the act in dispute; which was also adopted the 17th *Geo.* 2. c. 34. s. 9. and the 29 *Geo.* 2. c. 4. s. 9. And it is extremely material to observe, that the 32 *Geo.* 2. c. 25., which was made expressly to amend and explain the 29th *Geo.* 2. c. 34., entirely omits the sections of the former acts subsequent to the 6th of *Anne*, corresponding with the 5th, 6th, and 14th of the 16 *Geo.* 3. c. 5. on which the question arises; but adds a provision for the case of an appeal, in the 24th section, (which is also inserted in the 27th section of the 19 *Geo.* 3. c. 67.) and declares, that there shall be an appraisement, and that according to that appraisement the value shall be estimated, and the security given: this is a direct legislative exposition of what was meant by the former statute 29 *Geo.* 2. c. 34. s. 9. being contained in the only clause which mentions an appeal: and the 9th section of the 29 *Geo.* 2. c. 34. thus explained, is *verbatim* the same as the 14th section of the 16 *Geo.* 3. c. 5.

But independent of this analogy between the several prize acts, the clause in dispute directs, that execution of the sentence shall not be suspended by reason of an appeal; the sentence therefore is meant to be carried into immediate execution, and of course security is to be immediately given. That security must be measured, either by the produce of a sale at that place where the ship is carried, and the security taken, or by the invoice price. There can be no medium. The invoice price will ascertain the value at the time when the ship left the port from whence it came; and the produce of a fair sale will determine the value at the place at which it arrives. But the invoice price cannot be the true measure, from the manifest injustice which would ensue from it. For if the goods should

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1789. be carried to a port, where the value of them would be infinitely greater than the invoice price, and security to be taken for no more than that price, the consequence would be, that the captor would gain, and the owner lose the difference: on the other hand, if the value at the place of sale should be less than the invoice price, the captor who meant to do his duty, who had a probable cause of seizure, (which must be intended from the sentence of a court of Admiralty in his favour,) would be obliged to pay a considerable sum of money, for having done what his duty required him to do. This is not the case of a captor wantonly seizing ships, and carrying them to that port, which would be most for his interest. The act was not made for the encouragement of privateers, but to vest the property of *American* prizes in the king's navy; the officers of which were bound to take such ships as belonged to the *Americans*, and carry them into that port to which they were ordered to go by their superiors. But even if they had a power of making choice of the port to which they would go, it is not to be supposed that the officers of the king's ships are to enter into all the speculations of adventuring merchants. The produce therefore at the port to which the prize is carried must be the full value, according to the true construction of the act.

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This construction receives additional weight, from referring to the practice of the common law, in cases where the value of a thing seized is to be ascertained, before the legality of the seizures is determined. In *Gilbert's History of the Exchequer* (a), it is said, by analogy to the process of seizing lands, that the process on seizure of goods is, "When the officer has seized, if the port be 100 miles distant from town, he is to take out the writ of appraisement returnable in 14 days, and on this writ of appraisement they return the value of the goods as it is found by the jury; but upon the return of the writ of appraisement, the goods are set up to cant, lest they should not be appraised according to their true value; and if any claim were put in, and the goods perishable, the claimer was permitted to have writ of delivery, upon giving security to answer the value of the goods;" it appears from hence, that even where there is a writ of appraisement, the court of *Exchequer* consider the putting up the goods to public cant or auction, as the most efficacious method of ascertaining their

(a) Page 118.

real value. So also where judgment has been obtained and execution issued, if afterwards the judgment should be set aside, the value only, for which the goods were sold, is to be restored, provided the sale were without fraud. In *Moor* 573, it was determined, that where a sheriff had sold a term under a *fi. fa.* and afterwards judgment was reversed, the money should be restored which arose from the sale, and not the term itself. To the same effect is 5 *Co.* 90. *b.* In the present case it is admitted by the pleadings, that the sale at *Halifax* was without fraud, under a judgment, which judgment has been reversed. In the case of *The Victoria*, a Dutch ship taken by his majesty's ship *The Portland*, the ship and cargo were condemned, and, on an appeal, restitution of the value was decreed: the claimants insisted, that under the term value, they were entitled to the invoice price, the goods having been sold to disadvantage at *Barbadoes*, to which place they were carried; but the court of appeals, on the 12th of July, 1784, decreed restitution to be made according to the account of sales. So in the case of *The Santissima Annunciata*, a *Ragusan* ship, taken and carried into *Gibraltar* by his majesty's ship *The Brilliant*, restitution of the cargo, or the value thereof, was decreed, upon an appeal: the claimants urged that the value was the prime cost or invoice price, which they proved, and was allowed by the registrar, to be 2185 *l.* 1 *s.* 2 *d.*: the captors insisted, that they were liable to no more than the produce of the sale, which was only 1480 *l.*: the Lords decreed restitution to be made according to the account of sales. With respect to the argument, that the expence of the condemnation and sale ought not to fall upon the claimant, it is to be observed, that the lords of appeals do not consider themselves at all bound by the value at the place of sale, but refer it to the registrar to take an account of the full value, without regard to the sale.

The next question is, whether the security were such as the court of Vice-Admiralty could lawfully take. Now the (a) form of it is exactly similar to that of a common law recognizance. The lords of appeals call it a recognizance, as appears by the declaration. But it is a settled rule of law, that no court can take a recognizance, which is an acknowledgment of a debt on record, except a court of record. *Bro. Abridg.* tit. *Recognizance*, pl. 14. 2 *Roll. Abr.* 393. pl. 1. *Noy* 25. 1 *Kebl.* 552.

(a) *Vide post.* these forms.

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and it is expressly said by Lord Coke, 4 *Inst.* 135., that a court of Admiralty cannot take such a recognizance as a court of record may take. The description of a stipulation cited from *Vinnius*, is no more than that of a contract made in the form of question and answer; but such a contract is not a recognizance. As to the cases cited from Lord Raymond, confirmed as they are by that of *Dimmock v. Chandler*, 2 *Str.* 890. they prove only that such a security as the courts of Admiralty could take (whether called by the name of recognizance or stipulation, both of which are used indiscriminately by the reporters,) might be there proceeded upon: but they by no means prove that such a recognizance as a court of common law would take, could be proceeded upon in the Admiralty. As to the authority of *Cro. Eliz.* 685., if the obligation there mentioned were an obligation at common law under seal, it could not be enforced in the courts of Admiralty, though it might, if it were a mere stipulation. The case in 2 *Siderfin* 152. of *Becks v. Chelcock*, is too loosely reported to be relied on: it was this, "one having
 " taken a ship as prize, containing goods prohibited, entered
 " into a recognizance with sureties before the judges delegates,
 " to bring the money he should gain by the sale of the goods into
 " the Admiralty court before a certain day, if they upon a plea
 " there pending, did not adjudge the ship and goods to be
 " lawful prize." It then goes on to state, that "they after
 " many times cite the owner before the judges of the Admiralty,
 " and for his not coming and bringing in the money at the day,
 " they threaten to sue execution against the sureties who were
 " merchants of London; and then Wild prayed to have a
 " prohibition, because by the *first judgment or sentence*, the
 " recognizance was discharged." So that Wild contended, that by the *first* judgment the recognizance was discharged, whereas the case stated no second judgment. But the case probably was, that the ship was adjudged lawful prize in the court of Admiralty; that an appeal was made to the delegates, who determined it was not lawful prize, and then proceeded upon the recognizance. On this ground a prohibition was moved for, Wild contending, that as this security was taken in the inferior court, and that court had decided in favour of the persons entering into it, by that decree the security was discharged: though the delegates reversed the sentence, yet the condition of the recognizance was performed,

performed, when the court below decreed in favour of the capture, and upon this ground was the decision: there was no question in dispute, whether the recognizance was such as a court of Admiralty could take or proceed upon: that case therefore is not applicable to the present. The authority cited from *Fitz. N. B.* is, that "if a man acknowledge in the spiritual court that he ought to pay such a sum on such a day, a prohibition will not lie;" but this is only saying, that some sort of security may be there taken. The (a) form of security given, on taking out letters of marque, is not an acknowledgement to the king, as was contended; nor that used in the court of Admiralty here, in cases exactly similar with the present. These securities derive their whole force and effect from the submission and consent of the parties, without which, no process could issue; and are like rules of court at common law to which parties mutually agree to submit: but a recognizance is an acknowledgement on record of a prior existing debt, on which process may immediately issue without any consent of the parties. In the present case there is an absurdity on the face of the security taken: in the suit in the Vice-Admiralty court of *Halifax*, the king and the captor were the prosecutors, and defendants in the appeal; the security is taken from the captor to the king, that is from one defendant to another. Another objection to it is, that being an acknowledgement of a debt to the king, it would bind the lands of the debtor: even the assignment of a debt to the king has that effect, 4 *Inst.* 115. and would not be discharged by a commission of bankrupt. Either way therefore this security is bad; if it be an acknowledgement of a debt on record, (which it ought to be as it is to the king, *Gilb. Exc.* 165.) it is void, being taken in a court not of record; if it be not void, it will enable the court of Admiralty to affect lands.

With respect to the remaining question, whether a prohibition will not lie, if the court of appeals has misconstrued the act of parliament, it is clear that where an inferior court exceeds its jurisdiction it is liable to be restrained by a court of common law. In 1 *Salk.* 550. a prohibition was granted to a dutchy court; in 2 *Lord Raymond* 1408. to a court of great sessions in *Wales*; and in 4 *Inst.* 322. it is laid down that a prohibition will go to the convocation. In the present case, an

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(a) *Vide* *post.* these forms.

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It was replied,

That if the argument drawn from the *French prize act*, 19 *Geo. 3. c. 67.* had any weight, it was in favour of the defendants in prohibition, rather than the plaintiffs; as it appeared from thence, that the legislature being aware that in the 16 *Geo. 3. c. 5.* there was no clause to limit the obvious meaning of the words "full value," had supplied that deficiency by adding in the 19 *Geo. 3. c. 67.* other words to explain them. But that act, being subsequent to the act in dispute, cannot affect it. As to the other acts which have been cited, it appears from them, that subsequent to the 6th of *Anne*, when the first law was passed on the subject, from which the present act was copied, alterations were made by the legislature, with a view to the proceedings in the several courts of prize; but those alterations, though some of them are adopted in the 16 *Geo. 3. c. 5.* do not make that act in *pari materia*, with those intermediate acts; it is formed from the 6th of *Anne, c. 37.* and is to be explained by reference to that act; but there the direction is, that good security shall be taken to answer the condemnation. Neither is the 19 *Geo. 3. c. 67.* in *pari materia* with the act in question: the 27th section of the 19 *Geo. 3. c. 67.* so much relied on by the plaintiffs in prohibition, was copied from the 24th section of the 32 *Geo. 2. c. 25.* and made solely in favour of other powers having a right to carry on trade with the enemies of this country, in time of war, by virtue of subsisting treaties: but no nation could have a right to trade with the *Americans* while they were in rebellion against *Great Britain*; this clause was therefore purposely omitted in the 16 *Geo. 3. c. 5.* But supposing the *French prize*

prize act could be called in to aid the construction of the *American* act, yet in the present case, neither the regulations prescribed in the 5th section of the *American*, or in the 27th of the *French* act have been complied with; those clauses therefore cannot in this instance be resorted to. As to the objection, that it would be unreasonable to require a larger security from the captor, after sentence in his favor, than before, when the legality of the capture was doubtful: it is to be observed, that in the former case the claimant is to have the first choice of the goods, which are to be restored to him, if he thinks proper to give security for the appraised value; but in the latter, the captor is to have them entirely in his power, to do what he pleases with them, without any right or choice on the part of the claimant; there is therefore a clear distinction between the two cases. What shall be deemed the full value must be left to the discretion of the court of prize: it has been determined differently in different instances; sometimes the invoice price has been the measure, at others the account of sales. In the cases cited on the part of the plaintiffs, of *The Victoria*, and *Santissima Annunciata*, the lords of appeals merely construed the meaning of the term "full value," as used in their own decrees, not as it was used in the act of parliament. The question in *Moore* 573. probably was, whether a *bond fide* purchaser of a term, should be obliged to restore it; but he certainly could not protect himself under a judgment which was reversed. If a sheriff, under an execution against *A.*, takes the goods of *B.*, he shall restore the real value of them, to be estimated by a jury, not the mere amount of a sale. In the passage adduced from *Gilbert* 112., where appraisement and sale are said to be the measure of value, the party claiming relies in the first instance, on appraisement, and the provision there made is only to remedy a defect in that appraisement. The cases cited, to shew that this security was such as the court of Vice-Admiralty could not take, prove only, that a court of Admiralty cannot take a common law recognizance, by which land might be affected, or upon which an action of debt might be brought. Admitting the authority of *Gilbert*, that the king can only take a matter of record, yet he does not mean that all debts to the king are specialty debts; they may be by inquest of office. But in some instances the king takes in the Admiralty by matter of record; as where he is entitled to the droits of Admiralty, there

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there is a debt due to him appearing on the rolls of the court, which are *quasi* records, though it is not estreated into the exchequer, but is followed by the process of the civil law, adopted in the courts of Admiralty. No court can fine and imprison, except it be a court of record; but the court of Admiralty may fine and imprison. 1 *Vent.* 1 *Com. Dig. tit. Imprisonment.* (H. 3.) It is clear therefore that the court of Admiralty is in the nature of a court of record, of an anomalous kind, being the king's court, and a court maritime. The parties who entered into the security, by which they admitted the jurisdiction of the court, and obtained restitution of the ship and cargo, shall not be permitted to deny the effect of that engagement, of which they receive the fruits. It was contended on the part of the plaintiffs in prohibition, that being only sureties, they were not liable for more than the value of the goods at the place of sale. But it is of the essence of the contract, into which bail enter, that they will be liable to the full extent of the security, as far as the court shall think justice requires; within which limits, the principal and bail are as one and the same person. This principle has been lately recognized in this court (a), and agreeable to this is the practice of the court of Admiralty; where in the case of *The Phoenix*, December 13, 1753, a monition was issued against both the captor and sureties, to make restitution of the ship and goods; and the same in many other cases before cited.

The securities taken in the Admiralty, on issuing letters of marque, have been sometimes taken to the king, and sometimes generally, without mentioning any person to whom the parties acknowledge the debt; but the greater part have been to the king, and it may from thence fairly be concluded, that the proper form is to the king (b). The objection, that this security would give the king a priority of debt, which could not be discharged under a commission of bankrupt, arises from construing it to be a common law recognizance, but would be avoided by considering it to be, what it really is, a stipulation. In 4 *Inst.* 322. a prohibition was granted to the convocation, because they were inquiring into matters not within their jurisdiction. The reason why an ecclesiastical court cannot try a modus is, that the rules of evidence respecting it are different

(a) *Mitchell v. Gibbons*, ante, 75.(b) *Rule first.* the modern forms.

in a court of common law; a greater length of time being required to establish it in the latter court, than in the former. The cases in *Rolle's Abridgement*, 306 and 307, were upon the construction of deeds under seal; in which, if the deeds were construed differently in the ecclesiastical court, and in a court of common law, a prohibition would lie to prevent the inconvenience which would arise if a deed, which had been construed one way in an ecclesiastical court, should, when brought before a common law court receive a different interpretation. But in the present case, the meaning of the term "full value" could never come before a court of common law, except on a motion for a prohibition; there is no room therefore for clashing interpretations of the statute. The authority in 2 *Rolle's Abridgement* 302, is founded on the circumstance of an action at common law being given by the statute 2 and 3 *Ed. 6.* for not setting out tithes; in such case therefore a variance of construction by the ecclesiastical court, would be a good ground of prohibition. In the case in *Godbolt* 218, the spiritual court was proceeding to punish a man, contrary to the express direction of a statute, and on that account was prohibited. Lastly, the question in dispute concerns the court of prize, and not the ordinary court of Admiralty, or Instance court. In the cases cited, the prohibitions were granted to the Instance court, but not to the court of prize. These courts are in their constitution, process, and subject matter of their jurisdiction, totally distinct and independent, as fully appears from Lord *Mansfield's* able and elaborate judgment in the case of *Lindo v. Rodney*, in the notes of *Le Caux v. Eden*, *Dougl.* 591.

On this day judgment was pronounced by

LORD LOUGHBOROUGH, who, after stating the declaration at length, (and observing, that though the sale of the ship and cargo was said to have been made by the public vendue master, by public auction, with an averment that the produce was the utmost value of the same at *Halifax*, yet that in fact in such cases, the vendue master did not sell under the immediate authority of the court of Vice-Admiralty, but as an auctioneer employed by the parties,) proceeded as follows:

On this declaration are alleged two different *gravamina*; the first, that the court of appeals has misconstrued the act of parliament, by which its jurisdiction is regulated; the second, that it is using process which it has no authority

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thority to enforce. Either of these points, clearly made out, would be a good ground of prohibition: the first, on an antient and essential maxim of the common law, that all courts of special jurisdiction created by act of parliament, must be limited in the exercise of that jurisdiction, by such construction as the courts of common law may give to the statutes; because, if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the common law: the second, on a maxim equally well established, that these courts of special jurisdiction cannot assume to themselves the authority of courts of record, and bind the estates of the subjects of the realm.

Two questions therefore present themselves to be considered:

1. Whether the security taken by the Vice-Admiralty court of *Halifax* be such as that court was competent to take?

2. Whether, supposing such security to be good, the lords commissioners of appeals have misconstrued the act of parliament, which having, as is contended, fixed a defined value on prizes, has left them no discretion to estimate the value?

The first question may be disposed of without any difficulty. It has been truly said, that a strict recognizance being an acknowledgement of a debt to the king on record, cannot be taken in a court not of record. But this security, though bearing the form of a recognizance, is improperly so called, not being a recognizance in reality. It has none of the attributes of a recognizance; it could not be proceeded upon as such, nor in its consequence is it like a legal recognizance. It seems to have been taken in this form in the court of Vice-Admiralty at *Halifax*; from the inexperience of the officers, being different from that hitherto used in our courts of admiralty in *England*, in which the parties merely enter into an undertaking to submit to the order of the court, according to the event of the appeal. To call it therefore what it is not, merely from its accidental form, would be evidently absurd. The authorities cited from *Lord Raymond* sufficiently prove that courts of admiralty may take stipulations from parties to perform what shall be awarded them to do. The acts of parliament relating to this subject do not point out the form of the security, but direct generally that such security shall be taken, as the court of Admiralty is enabled to take. Upon the just construction, therefore, of the security in question, we are of opinion, that it is no more than under-
taking

dertaking to submit to the directions of the court; for we should act upon very narrow and illiberal principles, if we were to construe this to be a strict legal recognizance, only because it has a resemblance to what the court of Vice-Admiralty had no authority to take. Operating therefore as a stipulation, execution upon it belongs to that court, and that jurisdiction to which the parties have agreed to submit.

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The second question, though somewhat more extensive, is not more difficult than the first. It has been contended, that the security is limited to a certain defined value, and cannot be taken for any other: that defined value is said to be the produce according to the appraisement or sale at the place of condemnation. If this be true, the argument is well founded, that the proceeding to enforce payment of a security taken for a larger sum is without authority. But this proposition is not supported by the express words of that section of the act of the 16 Geo. 3. on which the question arises, namely, the 14th, which only directs security to be taken to restore the ship and cargo, "*or the full value thereof*." No mode of ascertaining that value is prescribed; yet it is said, that by reference to other parts of the same act, and to similar clauses of other acts *in pari materia*, the words "*full value*" receive a fixed meaning, and denote the value arising on appraisement or sale of the prize at the place of condemnation. Whether this be the true construction, will be seen upon the several prize acts being fairly produced and examined.

Before the sixth year of the reign of Queen Anne, there were no laws made on this subject. Previous to that time, all prizes taken in war were of right vested in the crown, and questions concerning the property of such prizes were not the subject of discussion in courts of law. But in order to do justice to claimants, from the first year after the restoration of Charles the Second, special commissions were issued to enable the courts of Admiralty to condemn such captures as appeared to be lawful prizes, to give relief where there was no colour for the taking, and generally to make satisfaction to parties injured. By the act of the 13 Car. 2. c. 9. (a) indeed, some regulations were made concerning the treatment of ships taken, but no provisions enacted respecting any security to be given on delivery: the sole interest in the thing condemned being in the

(a) Repealed by 22 G. 2. c. 33.

1789. crown, it was in public custody, and the disposition of it a mere matter of prerogative; no such provisions therefore were necessary. But in the sixth year of *Queen Anne* it was thought proper, for the encouragement of seamen, to vest in them the prizes they should take: and for that purpose the statutes 6 *Anne*, c. 13. and c. 37. were passed. The first of these acts only respects proceedings in the courts of Admiralty in *England*, but contains no particular directions to them, the practice of those courts being already settled; the second, 6 *Anne*, c. 37. is particularly intended for the regulation of the courts of Vice-Admiralty in *America*: and the operation of it is confined to captures and condemnations there made. One object of that act was, that the judge should proceed to sentence with all possible expedition: in the fourth section, therefore, this case is provided for; namely, that if on the preparatory examinations there should arise a doubt in the breast of the judge, whether the capture were prize or not, and further proof should appear to be necessary, the ship and cargo should be appraised by persons named on the part of the captor, and be delivered up to the claimants, on their giving *good and sufficient security* to pay to the captor the full value thereof according to such appraisement, if the ship should be adjudged lawful prize by the same judge: by this provision the claimant is entitled to the immediate possession of the subject in dispute, which the captor cannot obtain, but on the refusal of the claimant to give security for the appraised value. After a sentence of condemnation, the captor has a right to the possession; no appraisement is to be made in case of an appeal, nor is there any provision for a sale by authority of the court, in order to ascertain the value; but (by the 8th section of the act) the appeal is to be allowed in like manner as appeals from the courts of Admiralty in *England*, with a special direction that the appellant shall enter into a security to prosecute the appeal, answer the condemnation, and pay treble costs, if the sentence shall be affirmed: no direction is given as to any security to be taken from the party appellate, but by reference to the practice of the court of Admiralty in *England* on appeals to the sovereign; and it is added, that the execution of the sentence shall not be suspended by reason of any appeal.

Upon

Upon the breaking out of the war with *Spain* in the year 1789. 1740, the 13 *Geo. 2. c. 4.* was passed, the third section of which act contains the same provision as the fourth section of 6 *Anne, c. 37.* with this addition, that goods on board captured ships should be unladen simply for the purpose of appraisement. The eighth sections also of these two acts are similar, except that in the latter an express provision is made with respect to appeals, that the parties appellate shall give *sufficient security* to restore the ship and cargo, or the *full value thereof*, in case the sentence shall be reversed: this is annexed to the direction, that the execution of the sentence shall not be suspended by an appeal. Under this clause the party appellate has his option, either to take possession, giving security for the full value, or to let the execution of the sentence remain suspended; but there is no direction for any appraisement to be made, or any sale by public authority, to ascertain the extent of the security. To the same effect, and nearly in the same words as the 13 *Geo. 2. c. 4.* are the acts 17 *Geo. 2. c. 34. s. 8 & 9.* and the 29 *Geo. 2. c. 34. s. 3 & 9.* which last was made on the commencement of hostilities with *France*, without any express declaration of war. But during the prosecution of the war, which ensued in the year 1758, great complaints were made by neutral powers of the misconduct of *English* privateers in the Channel, in seizing their merchantmen; and a question had also arisen between the subjects of *Holland* and the officers of the *British* navy, upon the extent of the treaty of commerce between this country and the *Dutch* republic; the *Dutch* claiming a right to carry to the *French* all such goods as were not specifically enumerated under the title of contraband; while, on the part of the *British* navy, it was contended, that free ships only made free goods, as to such course of trade as was carried on in time of peace; that the *Dutch* being excluded from the *French* islands in the *West Indies* in time of peace, and only admitted in time of war, to cover their trade, their ships ought to be considered as adopted *French*, and were therefore lawful prize. The agitation of this question led other neutral powers to make similar claims, according to their different interests and connections with *Great Britain*. It was owing to these transactions that the 32 *Geo. 2. c. 25.* was made to explain and amend the 29 *Geo. 2. c. 34.* and contained a provision in the 24th section, in favour of neutral powers claim-

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Next came the act 16 Geo. 3. c. 5. on which the present question arises, and which was made on the war with the then *American* colonies. In this act the clause respecting neutral powers was purposely omitted; for no other power could have any right or privilege, by treaty or otherwise, to trade with those colonies, then part of the *British* dominions, and in open rebellion to the *British* government. But when subsequent hostilities took place with *France*, *Spain*, and the United Provinces, this provision became again necessary, because similar questions might arise with respect to neutral powers. It was accordingly inserted in the *French* (a), *Spanish* (b), and *Dutch* (c) prize acts.

I have taken this general view of the several acts made on the subject before us, in order to shew that the 16 Geo. 3. c. 5. and the 19 Geo. 3. c. 67. are not *in pari materia*, and consequently there can be no reasoning drawn from the one to the other.

It remains then to be considered, whether on the context of the 16 Geo. 3. c. 5. we can say, that the court of appeals did wrong in ordering a larger sum to be paid, than the amount of the sale at the place of condemnation. It was argued with a degree of plausibility, that made some impression on my mind, that by the 5th and 6th sections, when there were doubts entertained of the legality of capture, the value was to be estimated by appraisement; but that, by allowing an indefinite meaning to the words "full value" in the 14th, the captor, with a sentence in his favour, would be in a worse situation than when the legality of the capture was doubtful. But if this be attended to, there will appear neither injustice or hardship on the captor. In the case provided for by the 5th and 6th sections, the claimant is to have immediate possession on giving security for the appraised value; and it is only on the event of his refusal that the captor is to have it. The fairness of the

(a) 19 G. 3. c. 67.

(b) 20 G. 3. c. 23.

(c) 21 G. 3. c. 15.

appraisement must be presumed from his not choosing to take possession and give security; and it is the act of the claimant which forces the possession on the captor: but by the 14th section, the captor, having obtained a sentence, has an absolute right to the possession of the prize, to dispose of it where and how he pleases, on the terms of giving security; but he is not obliged to assume the possession, if he does not choose to give the security; the claimant cannot, as in the former case, force the possession upon him. The 14th section, therefore, which respects a proceeding after sentence, and the 5th, which provides against a delay before sentence, refer to cases so distinct, that there is no analogy between them. In order to introduce the interpretation contended for, of the 14th section, we must be obliged to add to the description of the security to restore the ship and cargo, or the "full value thereof," words to the following effect, "*at the place of sale, such sale being made without fraud, by persons authorised, &c.*" which would be an extraordinary latitude of construction; especially when no sale is directed, no persons appointed to make it, and no captor obliged to sell at the place of condemnation.

We are therefore of opinion, upon the second question, that the lords commissioners of appeals were not tied down to any definite measure of value to be given in lieu of the ship and cargo. Whether it ought to be the invoice value, the value at the port to which the ship was carried, or at the port to which she would have gone, if the voyage had not been interrupted, are questions which will admit of much argument and doubt. But even if we thought that the court of appeals had given an erroneous judgment as to the value; if we, sitting in a court of prize, should have ourselves determined differently; or could such a question have come before a court of common law, and it should have been proper to direct the jury to find the value at the place of sale; still there is no ground for a prohibition. I would not be understood to say that the commissioners of appeals have, in fact, made an improper estimate of the value; but be that estimate right or wrong, it is our province to say whether they have misconstrued the law, misconstruction of law being a ground of prohibition. But as we are all of opinion, that the act in dispute gives them authority to decide upon the measure of value, we have no right

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The following is the modern form of the security entered into by the sureties, on an appeal from a sentence of the High Court of Admiralty, in England.

[After stating the proceedings in the court of Admiralty]

Then the said *A. B.* (a) produced for sureties *C. D.* of — and *E. F.* of —, who submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators for *G. H.* the — (b) of the said ship and cargo, in the sum of — *l.* of lawful money of Great Britain, being double the amount of the value of the said cargo, as before alleged, unto the said *I. K.* the — (c), to abide the event of the appeal, and to pay what may be decreed to be restored, together with expences: and unless they shall so do, they do hereby severally consent, that execution shall issue forth against them, their heirs, executors, and administrators goods and chattels, wheresoever the same shall be found, to the value of the sum of — *l.* aforementioned.

The security taken from the plaintiffs in the above case, of *Brymer v. Atkins*, in the court of Vice-Admiralty of Halifax, stated that they “in their own proper persons, jointly and severally acknowledged to owe to our sovereign lord the king, the sum of 9765 *l.* 17 *s.* 3 *d.* currency.”

The condition of that recognizance was to restore the said ship and cargo, or the “value thereof,” in case the sentence appealed from should be reversed; and then that “recognizance” to be void, &c.

The modern form of the security, entered into on granting letters of marque or reprisals.

[After mentioning the time, place, name of the parties, &c. goes on thus:] *Who submitting themselves to the jurisdiction of the high court of Admiralty of England, obliged themselves, their heirs, executors, and administrators, in the sum of — *l.* of lawful money of Great Britain to this effect; that is to say whereas A. B. is duly authorized by letters of marque and reprisals, with the ship called the C. D. of the burden of about — tons, whereof he the said A. B. goeth master, by force of arms to attack, surprize, seize, and take all ships and vessels, goods, wares, and merchandise, chattels, and effects, belonging to the French king, or to any of his vassals and subjects, or others inhabiting within any of his countries, territories, or dominions whatsoever, (excepting only within the harbours or roads within shot of the cannon of princes, and states, in amity with his majesty;) and whereas he the said A. B. hath a copy of certain instructions, approved of and passed by his majesty in council, as by the tenor of the said letter of marque and reprisals, and instructions thereto relating, more at large appeareth; if therefore nothing be done by the said A. B. or any of his officers, mariners, or company, contrary to the true meaning of the said instructions, and of all other instructions which may be issued in like manner hereafter, and whereof due notice shall be given him; but that the letters of marque and reprisals aforesaid, and the said instructions, shall in all particulars be well and duly observed and performed, as far as they shall the said ship, master, and company any way concern; and if they shall give full satisfaction for any damage, or injury, which shall be done by them, or any of them, to any of his majesty's subjects, or foreign states in amity with his majesty, and also shall duly and truly pay or cause to be paid to his majesty, or the customs or officers appointed to receive the same for his majesty, the usual customs due to his majesty, of and for all ships and goods so as aforesaid taken and adjudged for prize; and moreover, if the said A. B. shall not take any ship or vessel, or any goods or merchandises, belonging to the enemy or otherwise liable to confiscation, through consent, or clandestinely, or by collusion, by virtue, colour, or*

a. The Prosecutor. *(b)* Captor or claimant as the case may be. *(c)* Captor or claimant.

of pretence, of his said letters of marque and reprisals, *that then this bail shall be void, and of none effect; and unless they shall so do, they do all hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum of ——— l. before mentioned, and in testimony of the truth thereof they have hereunto subscribed their names, &c.*

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THE END OF HILARY TERM.

The following are the material Sections of the several Prize Acts cited in the preceding Case of BRYMER v. ATKINS.

6 *Anne*,
c. 37. §. 2.

AND for the better encouragement also of such ships and vessels of war, which are or shall be in her majesty's pay or service, be it further enacted by the authority aforesaid, that the *flag officers, commanders, and other officers and seamen of every such ship or vessel of war, shall have the sole interest and property of and in all and every ship, vessel, goods, and merchandize they shall take in any part of America, (being first adjudged lawful prize in any of her majesty's courts of Admiralty, and subject to the customs and duties payable to her majesty, as if the same had been first imported to any part of Great Britain, and from thence exported, for and in respect of all such goods and merchandize) to be divided in such proportions, and after such manner as her majesty, her heirs and successors shall think fit to order and direct.*

Section 4.

And for the more speedy proceeding to condemnation or other determination of any prize ship or vessel, goods and merchandizes taken by any such privateer ship, or by any of her majesty's ships of war in such courts of Admiralty as aforesaid, and for lessening the expences that have been usual in those cases; be it further enacted by the authority aforesaid, that the judge or judges of such court of admiralty, or other person or persons thereto authorized, shall within the space of five days after request to him or them for that purpose made, finish the usual preparatory examination of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether the same be lawful prize or not; and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed in the usual manner by the person or persons proper to execute the same, within the space of three days after request in that behalf made; and in case no claim of such capture, ship, vessel, or goods shall be duly entered or made in the usual form, and attested upon oath, giving twenty days notice after the execution

tion of such a monition ; or if there be such claim, and the claimant or claimants shall not within five days give sufficient security (to be approved by such court of Admiralty) to pay double costs to the captor or captors of such ship, vessel, or goods, in case the same so claimed shall be adjudged lawful prize ; that then the judge or judges of such court of Admiralty shall, upon producing to him or them the said examinations or copies thereof, and upon producing to him or them, upon oath, all papers and writings which shall have been found taken in or with such capture (or upon oath made that no such papers were found) immediately, and without further delay proceed to sentence, either to discharge and acquit such capture, or to adjudge or condemn the same as lawful prize, according as the case shall appear to him or them upon perusal of such preparatory examinations, and also of the writings found taken in or with such capture (if any such writing shall be found) ; and in case such claim shall be duly entered or made, and security given thereupon, according to the tenor and true meaning of this act, and there shall appear no occasion to examine any witnesses, other than what shall be then near to such court of Admiralty, that then such judge or judges shall forthwith cause such witnesses to be examined, and (within the space of ten days after such claim made, and security given) proceed to such sentence as aforesaid, touching such capture ; but in case, upon making or entering such claim, and the allegation and oath thereupon, or the producing such writings as shall have been found taken in, or with such capture, or upon the said preparatory examinations, it shall appear doubtful to the judge or judges of such court of Admiralty, whether such capture be lawful prize or not ; and it shall appear necessary according to the circumstances of the case, for the clearing and determining such doubt, to have an examination of witnesses that are remote from such court of Admiralty, and such examination shall be desired, and that it be still insisted on, on the captor's part, that the said capture is lawful prize, and that the contrary be still persisted in, on the claimant's behalf, that then the said judge or judges shall forthwith cause such capture to be appraised by persons named on the part of the captor, and sworn truly to appraise the same according to the best of their skill and knowledge, and shall after such appraisement made, and within the space of fourteen days after the making of such claim, proceed to *take good and sufficient security from the claimants to pay*

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 in case the same shall be adjudged lawful prize; and, after such
 security duly given, the said judge or judges shall make an inter-
 locutory order for releasing or delivering the same to such claim-
 ant or claimants, or his or their agents; and the same shall be
 actually released or delivered accordingly.

Section 5. And it is further enacted by the authority aforesaid, that if
 any claimant or claimants shall refuse to give such security, the
 judge or judges shall cause the captor or captors in like manner
 to give good and sufficient security, to be approved of by the
 claimant or claimants, to pay to the said claimant or claimants
 the *full value according to the appraisement*, in case any such capture
 or captures shall be adjudged not to be lawful prize; and the
 said judge or judges shall thereupon proceed to make an inter-
 locutory order for the releasing and delivering of the same to the
 said captor or captors, or their agents.

Section 7. Provided nevertheless, and it is hereby further enacted by the
 authority aforesaid, that if any captor or captors, claimant or
 claimants, shall not rest satisfied with the sentence given in such
 court of Admiralty, it shall and may be lawful to the party or
 parties thereby aggrieved, to *appeal* from the said court of Ad-
 miralty to her majesty in her privy council; such appeal to be
 allowed in the like manner as appeals to her majesty are now al-
 lowed from the court of Admiralty within this kingdom, so as
 the same be made within fourteen days after sentence, and *good*
security be likewise given by the appellant or appellants, that he
 or they will effectually prosecute such appeal, and *answer the*
condemnation, as also pay treble costs as *shall be awarded* by her
 majesty, in case the sentence of such court of Admiralty be af-
 firmed, and so as execution be not suspended by reason of any
 appeal, any thing in this act before contained to the contrary
 hereof in any wise notwithstanding.

13 Geo. 2.
 c. 4. s. 3. And for the more speedy proceeding to condemnation, or
 other determination of any prize, ship or vessel, goods or mer-
 chandizes, taken as aforesaid, and for lessening of the expences
 that have been usual in the like cases, be it further enacted by
 the authority aforesaid, that the judge or judges of such court
 of Admiralty, or other person or persons thereto authorized,
 shall, within the space of five days, after request to him or them
 for that purpose made, finish the usual preparatory examination
 of

of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether the same be lawful prize or not, and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed in the usual manner, by the person or persons proper to execute the same, within the space of three days, after request in that behalf made; and in case no claim of such capture, ship, vessel, or goods shall be duly entered, or made in the usual form, and attested upon oath, giving twenty days' notice after the execution of such monition; or if there be such claim, and the claimant or claimants shall not within five days give sufficient security (to be approved by such court of Admiralty) to pay double costs to the captor or captors of such ship, vessel, or goods, in case the same so claimed shall be adjudged lawful prize, that then the judge or judges of such court of Admiralty shall, upon producing to him or them the said examinations or copies thereof, and upon producing to him or them, upon oath, all papers and writings which shall have been found, taken in or with such capture, or upon oath made, that no such papers were found, immediately and without further delay, proceed to sentence, either to discharge and acquit such capture, or to adjudge and condemn the same as lawful prize, according as the case shall appear to him or them, upon perusal of such preparatory examinations, and also of the writings found, taken in or with such capture, if any such writing shall be found; and in case such claim shall be duly entered or made, and security given thereupon, according to the tenor and true meaning of this act, and there shall appear no occasion to examine any witnesses, other than what shall be then near to such court of Admiralty, that then such judge or judges shall forthwith cause such witnesses to be examined, and within the space of ten days after such claim made, and security given, proceed to such sentence as aforesaid, touching such capture; but in case, upon making or entering such claim, and the allegation and oath thereupon, or the producing such writings as shall have been found, taken in or with such capture, or upon the said preparatory examinations, it shall appear doubtful to the judge or judges of such court of Admiralty, whether such capture be lawful prize or not; and it shall appear necessary, according to the circumstances of the case, for the clearing and determining such doubt, to have an examination of witnesses

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that are remote from such court of Admiralty, and such examination shall be desired; and that it be still insisted on, on behalf of the captors, that the said capture is lawful prize; and that the contrary be still persisted in on the claimant's behalf, that then the said judge or judges shall forthwith cause such capture to be appraised by persons named on the part of the captor, and sworn truly to appraise the same, according to the best of their skill and knowledge; for which purpose the said judge or judges shall cause the goods found on board to be unladen, and put into proper warehouses, with separate locks of the collector and comptroller of the customs; and where there is no comptroller, of the naval officer, and the agents or persons employed by the captors and claimants, at the charge of the party or parties desiring the same; and shall, after such appraisement made, and within the space of fourteen days after the making of such claim, proceed to take *good and sufficient security* from the claimants to pay the captors *the full value thereof, according to such appraisement*, in case the same shall be adjudged lawful prize; and after such security duly given, the said judge or judges shall make an interlocutory order, for releasing or delivering the same to such claimant or claimants, or his or their agents, and the same shall be actually released or delivered accordingly.

Section 4.

And it is further enacted by the authority aforesaid, that if any claimant or claimants shall refuse to give such security, the judge or judges shall cause the captor or captors in like manner to give good and sufficient security, to be approved of by the claimant or claimants, to pay the said claimant or claimants *the full value thereof, according to the appraisement*, in case any such capture or captures shall be adjudged not to be lawful prize; and the said judge or judges shall thereupon proceed to make an interlocutory order, for the releasing and delivering of the same to the said captor or captors, or their agents.

Section 5.

Provided nevertheless, and it is hereby further enacted by the authority aforesaid, that if any captor or captors, claimant or claimants, shall not rest satisfied with the sentence given in such court of Admiralty in any of his majesty's plantations or dominions abroad, it shall and may be lawful for the party or parties thereby aggrieved, to appeal from the said court of Admiralty to the commissioners appointed, or to be appointed under the great seal of *Great Britain*, for receiving, hearing, and determining

determining appeals in causes of prizes; such appeal to be allowed in the like manner as appeals to such commissioners are now allowed from the court of Admiralty within this kingdom; so as the same be made within fourteen days after sentence, and a good security be likewise given by the appellant or appellants, that he or they will effectually prosecute such appeal, and answer the condemnation, as also pay treble costs, as shall be awarded, in case the sentence of such court of Admiralty be affirmed, any thing in this act before to the contrary hereof in anywise notwithstanding. Provided always, that the execution of any sentence so appealed from as aforesaid shall not be suspended by reason of such appeal, in case the party or parties appellate shall give sufficient security, to be approved of by the court in which such sentence shall be given, to restore the ship, vessel, goods, or effects concerning which such sentence shall be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from shall be reversed.

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The 17 Geo. 2. c. 34. sections 3, 4. 8 & 9. and the 29 Geo. 2. c. 34. sections 3, 4. 8 & 9. are the same as the above sections of the 13 Geo. 2. c. 4.

And be it further enacted by the authority aforesaid, that in case any appeal shall be interposed from a sentence given in any Admiralty court, concerning any goods and effects which may hereafter be seized or taken as prize, in pursuance of the aforesaid act of parliament of the twenty-ninth year of his majesty's reign, or of this act; that then and in such case the judge of such court of Admiralty shall and may, at the request, costs, and charges, either of the captor or claimant, or of the claimant only, in cases where the privilege is reserved in favour of the claimant by any treaty or treaties subsisting between his majesty and foreign powers, make an order to have such capture appraised, unless the parties shall otherwise agree upon the value thereof, and an inventory taken, and then take security for the full value thereof, and thereupon cause such capture to be delivered to the party giving such security, in like manner as, by the said former act, such judge ought or could have done, before sentence given, notwithstanding such appeal: and if there shall be any difficulty or objection to the giving or taking of secu-

32 Geo. 2.
c. 25. s. 4.

1789, rity, the said judge shall, at the request of either of the parties, order such goods and effects to be entered, landed, and sold by public auction, as prize goods now are, under the care and custody of the proper officers of the customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors; and the monies arising by such sale shall be deposited in the bank of *England*, or in some public securities, and in the names of such trustees as the captors and claimants shall jointly appoint, and the court shall approve, for the use and benefit of the parties who shall be adjudged to be entitled thereto: and if such security shall be given by the claimants, then it is hereby also enacted, that such judge shall give such capture a pass, to prevent its being taken again by his majesty's subjects in its destined voyage.

16 Geo. 3.
c. 5. on the
construction
of which the
question arose,
p. 5.

And, for the more speedy proceeding to condemnation or other determination of any prize, ship or vessel, goods or merchandizes, to be taken as aforesaid, and for lessening the expences that have been usual in the like cases, be it further enacted by the authority aforesaid, that the judge or judges of such court of Admiralty, or other person or persons thereto authorised, shall, within the space of five days after request to him or them for that purpose made, finish the usual preparatory examinations of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether the same be lawful prize or not: and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed in the usual manner by the person or persons proper to execute the same, within the space of three days after request in that behalf made; and in case no claim of such capture, ship, vessel, or goods, shall be duly entered or made in the usual form, and attested upon oath, giving twenty days notice after the execution of such monition; or if there be such claim, and the claimant or claimants shall not within five days give sufficient security (to be approved of by such court of Admiralty) to pay double costs to the captor or captors of such ship, vessel, or goods, in case the same so claimed shall be adjudged lawful prize, that then the judge or judges of such court of Admiralty shall (upon producing to him or them the said examinations or copies thereof, and upon producing to him or them, upon oath, all papers and writings

writings which shall have been found taken in or with such capture, or upon oath made that no such papers or writings were found) immediately, and without further delay, proceed to sentence, either to discharge and acquit such capture, or to adjudge and condemn the same as lawful prize, according as the case shall appear to him or them upon perusal of such preparatory examinations, and also of the other last mentioned papers and writings found taken in or with such capture, if any such papers or writings shall be found; and in case such claim shall be duly entered or made, and security given thereupon according to the tenor and true meaning of this act, and there shall appear no occasion to examine any witnesses other than what shall be then near to such court of Admiralty, that then such judge or judges shall forthwith cause such witnesses to be examined within the space of ten days after such claim made and security given, and proceed to such sentence as aforesaid, touching such capture: but in case, upon making or entering such claim and the allegation and oath thereupon, or the producing such papers or writings as shall have been found or taken in or with such capture, or, upon the said preparatory examinations, it shall appear doubtful to the judge or judges of such court of Admiralty, whether such capture be lawful prize or not, and it shall appear necessary, according to the circumstances of the case, for the clearing and determining such doubt, to have an examination, upon pleadings given in by the parties and admitted by the judge, of witnesses that are remote from such court of Admiralty, and such examination shall be desired, and that it be still insisted on, on behalf of the captors, that the said capture is lawful prize, and the contrary be still persisted in on the claimant's behalf; that then the said judge or judges shall forthwith cause such capture to be appraised by persons to be named by the parties, and appointed by the court, and sworn truly to appraise the same according to the best of their skill and knowledge; for which purpose the said judge or judges shall cause the goods found on board to be unladen, and an inventory thereof being first taken by the marshal of the Admiralty or his deputy, shall cause all such parts of the goods and merchandize as are perishable commodities to be sold by publick sale, for the clear amount of which only the captors shall be answerable to the claimants, and the remainder of them to be
put

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1789. put into proper warehouses, with separate locks, of the collector and comptroller of the customs, and where there is no comptroller, of the naval officer, and the agents or persons employed by the captors and claimants, at the charge of the party or parties desiring the same; and shall, after such appraisement made, and within the space of fourteen days after the making of such claim, proceed to take *good and sufficient security* from the claimants to pay the captors *the full value thereof, according to such appraisement*, in case the same shall be adjudged lawful prize; and shall also proceed to take *good and sufficient security* from the captors to *pay such costs as the court shall think proper*, in case such ship shall not be condemned as lawful prize; and, after such securities duly given, the said judge or judges shall make an interlocutory order for releasing or delivering the same to such claimant or claimants, or his or their agents, and the same shall be actually released or delivered accordingly.

Section 6. And it is hereby further enacted by the authority aforesaid, that if any claimant or claimants shall refuse to give such security, the judge or judges shall cause the captor or captors in like manner to give *good and sufficient security* to pay the said claimant or claimants *the full value thereof, according to the appraisement*, in case any such capture or captures shall be adjudged not to be lawful prize; and the said judge or judges shall thereupon proceed to make an interlocutory order for the releasing and delivering the same to the said captor or captors, or their agents.

Section 13. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, that if any captor or captors, claimant or claimants, shall not rest satisfied with the sentence given in such court of Vice-Admiralty in any of his majesty's dominions, it shall and may be lawful for the party or parties thereby aggrieved *to appeal* from the said court of Vice-Admiralty to commissioners appointed, or to be appointed, under the great seal of *Great Britain*, for receiving, hearing, and determining appeals in causes of prizes, so as the same be made within fourteen days after sentence, and *good security be likewise given* by the appellant or appellants, that he or they will effectually prosecute such appeal, and *answer the condemnation, and also pay treble costs, as shall be awarded* in case the sentence of such court of Vice-Admiralty be affirmed; provided that the said captor or captors, claimant or claimants, do, within six months after

after sentence passed, give notice to the said court of Vice-Admiralty that they have appealed from such decree to the said commissioners.

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Provided always, and it is hereby further enacted by the authority aforesaid, that the *execution of any sentence so appealed from as aforesaid, shall not be suspended by reason of such appeal, in case the party or parties appellate shall give sufficient security, to be approved of by the court in which such sentence shall be given, to restore the ship, vessel, goods, or effects concerning which such sentence shall be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from shall be reversed.*

The 19 Geo. 3. c. 67. is similar to the 16 Geo. 3. c. 5. but contains in the 27th section the same provision as is made in the 32 Geo. c. 25. s. 24.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Twenty-ninth Year of the Reign of GEORGE III.

*Wednesday,
May 6th.*

The Mayor, Commonalty, and Citizens of the City of LONDON v. The Mayor and Burgeſſes of the Borough of LENNE REGIS, commonly called KING'S LYNN, in the County of NORFOLK.

The writ *de effendo quietum de theolonio*, is not merely prohibitory, but remedial, on which the parties may plead to iſſue on a queſtion of right.

A corporation to whom it is directed, cannot be attached for contempt, in their corporate capacity, for not returning it; but an attachment in the nature of a *pone* is the proper remedy to compel them to appear. The court will not grant a trial at bar, in an iſſuable term. In an action by one corporation againſt another, each may inſpect ſo much of the books and records of the other as relates to the ſubject in diſpute. [The court of C. P. held that] *Freemen of the city of London have a right to be exempt from the payment of all tolls and port duties throughout England, except the prizes of wines,* in whatever place they reſide, and though they have obtained their freedom by purchaſe. [See note at the end of this caſe, p. 210.]

THIS was an action on a writ (a) *de effendo quietum de theolonio*, of which the following is a copy, with the *aliàs* and *pluriès*.

“ George the Third, by the grace of God, &c. To the Mayor and Burgeſſes of the Borough of *Lenne Regis*, commonly called *King's Lynn*, in the county of *Norfolk*, greeting:

“ Whereas our city of *London* is, and from time whereof the memory of man is not to the contrary, hath been an ancient city; and the citizens of the ſaid city, during all the time aforeſaid have been a body corporate and politic, in deed, fact, and name, by divers names of incorporation; and for divers, to

compel them to appear. The court will not grant a trial at bar, in an iſſuable term. In an action by one corporation againſt another, each may inſpect ſo much of the books and records of the other as relates to the ſubject in diſpute. [The court of C. P. held that] *Freemen of the city of London have a right to be exempt from the payment of all tolls and port duties throughout England, except the prizes of wines,* in whatever place they reſide, and though they have obtained their freedom by purchaſe. [See note at the end of this caſe, p. 210.]

(a) So denominated in *Regiſtr. Brev.* 253. b. As this writ is not in common practice, it is ſtated at length. So alſo are the declaration and pleas.

wit,

wit, fifty years last past, have been a body politic and corporate, by the name of the Mayor and Commonalty, and Citizens of the city of *London*: And whereas also, amongst other the liberties, free customs, and privileges, from time immemorial used and enjoyed by the *said citizens* they the *said citizens*, from time whereof the memory of man is not to the contrary, have been used and accustomed to have and enjoy a certain ancient liberty and privilege; that is to say, that *the citizens of the said city, and all their goods, should be quit and free of and from all toll and passage, and (a) lastage, and other customs, throughout the whole kingdom of England, and the ports of the seas, (except only our due and ancient custom, and prizes of wines) all which said liberties and privileges have been confirmed by divers charters of our progenitors, and also by divers acts of parliament: Nevertheless you require the said citizens, as it is said, to yield toll, passage, lastage, and other customs to you, of their goods and things within the said borough and the port thereof, and do many ways unjustly disquiet them on that occasion, to the great damage of the said citizens, as we have received information from their complaints: We, willing that no injury should be done to the said citizens, command you, that if it be so, then desisting for the time to come, from bringing such disquietudes on the said citizens, you permit them to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, to you, of their goods and things in the same borough and the port thereof. Witness ourself at Westminster, the 19th day of July, in the 27th year of our reign."*

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The *aliàs* was the same as the original writ, except that after the words "We willing, &c. command you," were added, "as formerly we commanded you," &c. "or signify to us the cause, wherefore you would not, or could not execute our command, formerly directed to you therein. Witness ourself at *Westminster*, the 23d day of *July*, in the 27th year of our reign."

The *pluriis* was also the same as the original, except that after the words "command you," were added, "as we have often commanded you," &c. "or signify to us the cause, wherefore you would not, or could not, execute on command, formerly directed to you therein: And you slighting our said commands, as we are informed, have neglected hitherto to permit the said citizens to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, to you of their goods,

(a) Lastage was a duty of one penny for every quarter of corn, i. e. ten-pence for every last exported from *Lynn*.

and

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and things, in the said borough, and the port thereof, according to the liberty, free custom, and privilege aforesaid; or least wife to signify to us, the cause wherefore you would not, or could not do it; in manifest contempt of us, and of our said commands, and to the great damage and grievance of them the *said citizens*; to our great surprise and displeasure: We again command you; strictly enjoining, that you permit the *said citizens* to be quit of yielding toll, passage, lastage, and other customs to you, of their goods and things, within the said borough and the port thereof, according to the tenor of our said commands, formerly directed to you therein, or that you be before our justices at *Westminster* on the morrow of *All Souls*, to shew wherefore you have contemned to execute our commands so often directed to you therein; and have you there then this writ. Witness ourself at *Westminster*, the 26th day of *July*, in the 27th year of our reign."

In *Michaelmas* term 1787, *November* 6th. A rule was granted to shew cause, why the defendants should not have a fortnight's time to return the writ; which

November 8, was made absolute by consent.

November 17. A rule was granted to shew cause why the writ should not be quashed, and all the proceedings on it staid; chiefly on the grounds, that it was merely a prohibitory process, issuing from the crown to its bailiffs, to whom, or to the collectors of the toll, it ought to be directed; that it was returnable in Chancery and not in this court; and that it was not calculated to bring the question of right between the parties, fairly to issue on the record.

November 26. Cause was shewn, and in answer to the objections made on the part of the defendants, *Fitz. Nat. Brev.* 31. 33, 34. 518.—*Year Book*, 21 *Hen.* 7, 31.—2 *Inff.* 654.—*Registr. Brev.* 258. b. *Bro. Abr.* tit. *Contempt*, pl. 7. were cited.

November 27. Lord LOUGHBOROUGH declared the opinion of the court, that it was a remedial writ, on which the parties might plead to issue, on the authority of *Madox's Firma Burgi*, c. 7. f. 10. p. 138. and therefore the rule was discharged.

In the ensuing vacation, a peremptory rule was granted, as of the last day of the preceding term, for the defendants to return the writ on the first day of the next term. But no return being made,

In *Hilary* term 1788, *January* 28, a rule was granted to shew cause why an attachment of contempt should not issue against the defendants, by the title of the *Mayor and Burgeses of Lynn, &c.*

February

February 6. Cause was shewn, that a corporation could not be attached, in their corporate capacity. In support of the rule it was urged, that process of contempt would issue against the acting part of a corporation, for disobeying a *mandamus*, &c. on which point were cited the stat. 9 Anne, c. 20. and the case (a) of *The King v. The Mayor of Truro*, where the mayor being reported in contempt for disobeying a *mandamus*, to elect a burghers, the court imprisoned him three months, and ordered him to pay all costs.

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February 8. Lord LOUGHBOROUGH said, that upon consideration, the court were clearly of opinion that the rule must be discharged. The very form in which it was drawn up was a decisive reason against it. For supposing an attachment of contempt would issue, it must be against the individual members of the corporation, and not against the defendants in their corporate character. But the proper remedy to be pursued, was an attachment in the nature of a *pone*, the same as was mentioned in *Fitz. N. B.* 518. *Registr. Brev.* 258. and the *Year Book*, 21 H. 7. 31. This process was used in the writ of *monstraverunt* for tenants in ancient demesne, *de non ponendis in iussis et juratis*, *de corrodio habendo*, and others of a similar kind. His lordship observed, that it appeared from a note in *Fitzherbert*, that in a writ *de corrodio habendo*, which contained a clause "*vel causam nobis significes*" if the abbot returned cause at the "*sicut aliàs*," and no one came to counterplead the cause on the part of the king, the abbot was discharged. But if any one came for the king, and counterpleaded the cause, they could not interplead thereon, but a *pluriès* and attachment issued, and on the attachment they pleaded. So that even where obedience was paid to the king's writ by returning the cause, the plea between the parties could not proceed, without an attachment, to give day in court, as the commencement of the suit. It was clear, therefore, that the attachment mentioned in the books, was not a process of contempt, in not returning the writ, but issued merely to compel an appearance. Consequently the rule was discharged (b).

At length an appearance being entered, the following declaration was delivered.

(a) *B. R. Mich.* 45 Geo. 3.

(b) After this determination, the next effective step taken by the plaintiffs was the suing out a *disfringas*, on which 40s. issues were levied, which (the writ being neither returned, nor an appearance entered) were on motion increased to 40l. in consequence of which the defendants appeared.

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Norfolk, to wit.. The mayor and burgesſes of the borough of *Lenne Regis* commonly called *King's Lynn* in the county of *Norfolk*, were ſummoned to answer the mayor, commonalty, and citizens of the city of *London*, of a plea, wherefore they require the citizens of the ſaid city to yield *toll*, *paſſage*, and *laſtage* of their goods and things within the ſaid borough, and the port thereof; and thereupon the ſaid mayor, commonalty, and citizens of the ſaid city, by *Rowland Lickbarrow* their attorney, complain, for that whereas the city of *London* is, and from time whereof the memory of man is not to the contrary, hath been an antient city; and the citizens of the ſaid city during all the time aforeſaid, have been a body corporate and politic, in deed, fact, and name, by divers names of incorporation; and for divers, to wit, fifty years laſt paſt, have been a body politic and corporate, by the name of the mayor, commonalty and citizens of the city of *London*: And whereas alſo amongſt others the liberties, free cuſtoms, and privileges, from time immemorial uſed and enjoyed by the ſaid citizens, they the ſaid citizens, from time whereof the memory of man is not to the contrary, have been uſed and been accuſtomed to have and enjoy, and ſtill of right ought to have and enjoy, a certain antient liberty and privilege, that is to ſay, that the citizens of the ſaid city, and all their goods, ſhould be quit, and free of and from all toll, paſſage, and laſtage, and other cuſtoms throughout the whole kingdom of England, and the ports of the lord the king, except only his due and antient cuſtom, and prizes of wines; all which ſaid liberties and privileges have been confirmed by divers acts of parliament: And whereas our ſaid lord the king, did by his certain writ under the great ſeal of England, command the ſaid mayor and burgesſes, that they ſhould permit the ſaid citizens to be quit of yielding ſuch toll, paſſage, laſtage, and other cuſtoms as aforeſaid, of their goods and things in the ſaid borough and the port thereof; or on a certain day now paſſed, ſignify to him cauſe wherefore they had not executed his commands to them for the ſaid purpoſe, before then directed; yet the ſaid mayor and burgesſes, not regarding the ſaid writ of our ſaid lord the king, have not ſignified to him, as by the ſaid writ was commanded; and ſince the time of the aforeſaid writ of our ſaid lord the king to them directed, to wit, on the firſt day of *December* in the year of our Lord 1787, at the borough aforeſaid, in the county aforeſaid, did diſquiet the ſaid citizens on the occaſion aforeſaid, and did then and there require of *Osborn Denton*, *James Denton*, *Thomas Carr*, *Thomas Turner*,
and

and *Samuel Baker*, citizens of the said city, and of other citizens of the said city, *toll, passage, and lastage*, other than the custom and prizes of wines, (above excepted) of their goods and things, within the said borough, and the port thereof; in contempt of our said lord the king, and to the damage of the said mayor, commonalty, and citizens, of one hundred pounds, and therefore they bring their suit, and so forth.

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Plea.—And the said mayor and burgessees, by *Joseph Lyon* their attorney, come and say, that they the said citizens from time whereof the memory of man is not to the contrary, have not been used, and accustomed, to have and enjoy, and still of right, ought not to have, and enjoy the said antient liberty, and privilege, that is to say, that the said citizens of the said city, and all their goods, should be quit, and free, of and from all *toll, passage, and lastage*, and other customs throughout the whole kingdom of England and the ports of the lord the king, (except only his due and antient custom and prizes of wines,) as the said mayor, commonalty, and citizens, have in their said declaration above alleged; and of this they the said mayor and burgessees put themselves upon the country, &c. And the said mayor, and burgessees, for further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said *Osbert Denton, James Denton, Thomas Carr, Thomas Turner, and Samuel Baker* are not citizens of the said city of London, as the said mayor, commonalty, and citizens have above in their declaration alleged, and of this they the said mayor and burgessees put themselves upon the country, &c.

On these pleas issues were joined.

In *Michaelmas* term 1788, *November* 26th, it was moved to try the cause at bar in the next term; which was refused; that term being an issuable one.

In *Hilary* term 1789, *January* 23d. a rule was granted to shew cause why the trial should not be had at bar in *Easter* term following; which

February 10. was made absolute.

February 12. Rules were made absolute for each corporation to inspect so much of the books and records of the other as related to the subject in dispute. *Vide* 1 *Term Rep. B. R.* 689. and 3 *Term Rep. B. R.* 303. (a)

(a) [But see *Southampton Corp. v. Graven*, 3 *T. R.* 590. that such inspection is no longer to be considered as a matter of course.]

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On *Wednesday May 6*, in the present term, the cause came on to be tried at bar (a).

The counsel for the plaintiffs were Serjeants *Adair, Rooke, and Lawrence* (b); for the defendants, Serjeants *Bond, Le Blanc, and Runnington*.

The evidence on the part of the plaintiffs, was in substance as follows :

It was first proved, that the (c) persons named in the declaration were citizens and freemen of *London*, by the book in which their freedom was entered, and that in *February 1786*, they had obtained their freedom by (d) purchase. An *inspeximus* charter of *Car. 2.* was then produced, reciting and confirming various others; the most antient of which was in the reign of *Henry 1st*, and which contained these words (e) "*omnes homines London erint quieti et liberi, et omnes eorum res, per totam Angliam, et per portus maris, de theolonio, et passagio, et lastagio, et omnibus aliis consuetudinibus, &c.*"

"*Et si quis theolonium vel consuetudinem, a civibus meis London, ceperit, cives London in civitate capiant de burgo, vel de villâ, ubi, theolonium vel consuetudo capta fuerit, quantum homo London, pro theolonio dedit, et proinde de damno receperit* (f).

The other charters (g) were to the same effect, and nearly in the same words as that of *Henry the 1st*. Most of them excepted the king's right of prisage of wines; and used the words *cives*, as synonymous with *homines*.

There were also extracts read from other documents, and from the patent rolls in the *Tower*, recognizing this right of the citizens of *London*. Amongst these, was a charter of the 5th of King *John*, to the bishop of *Norwich*, empowering him to hold a fair at *Lynn*, and to take customs, rights, &c. "*salvâ libertate civitatis London, &c.*" and another in the same year of the same king (h) to the burgesses of *Lynn*, that *the borough should be free*, and that they should be free from toll, lastage,

(a) Only ten of the jury impanelled having appeared, two tales men were added. The junior secondary opened the pleadings by reading the record, and delivered the following charge to the jury: "Your charge is now to inquire upon each of the issues joined between the parties, and if you find a verdict for the plaintiffs you will assess their damages and costs; if for the defendants, you will declare accordingly."

(b) Mr. Rose, Mr. Gibbs, and Mr. Blofeld also held briefs for the plaintiffs.

(c) These persons were inhabitants of *Lynn*.

(d) The expence of which was 30 l. 12 s.

(e) It was agreed that the word *concessimus* or *concessisti*, was used in these charters as well to signify a recognition, as an original grant of privileges, &c.

(f) See *Hargrave's Tracts*. "*De portibus maris*" and "*concerning the customs.*"

(g) Which were granted by *John*, *Hm. 2. Hen. 3. Ed. 1. & Ed. 3.*

(h) Within the time of legal memory, i. e. since the reign of *Ric. 1.*

passage,

passage, &c. "*salvâ libertate civitatis London,*" likewise giving a power of distress to the mayor of *Lynn*, if any one should take toll, &c. in any part of *England*, from the burgesses, "*exceptâ ut superius civitate London.*" In this head of evidence was a (a) petition to parliament from *Thomas Chaucer*, the king's chief butler in the 11th year of *H. 4.*, complaining that residents at the out-ports had purchased the freedom of the city of *London*, so entitle them to an exemption from *prisage of wines*, and other customs and duties, and praying that parliament would intreat the king to send for the mayor and aldermen of the city, and command them to cease from granting to any foreigners (b) the freedom of the said city in future, on peril of forfeiting their franchise; and also to repeal the freedoms already granted to foreigners, that the king and his successors might not be deprived of his *prisage of wines*, by the franchises of the city of *London*. The answer of the king was, that he would send for the mayor and aldermen. It was then declared by the advice of the lords in parliament, that no one should have or enjoy such franchise unless he were a citizen resident and dwelling within the said city: and "*que toutz autres demeurantz en autres cites, burghs, ou villes, aient, et enjouient leur franchises à eux grantez, sauvant tout jourz, à notre Seigneur le Roy, son enheritance en ce cas.*"

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It was also proved by parol evidence, that non-resident freemen of *London* had been nominated to the office of sheriff, that they paid the fine for not serving it, that they had been aldermen, and had a right to vote for the election of members of parliament for the city. Also, that they were exempted at *Exeter* from the payment of tolls and port duties: at which place an action was brought by the corporation against a freeman of *London* there resident, to compel such payment, but the record being withdrawn, the defendant obtained judgment as in case of a non-suit; and afterwards himself brought an action against the corporation, for the taking his goods on the same account, in which the corporation suffered judgment by default.

It was likewise proved by parol evidence, that the same exemption was allowed, at *Plympton Fair*, *Exmouth*, *Bristol*, *Newcastle*, *Dartmouth*, and other ports, to freemen of *London*, resident at those places (c).

(a) Vide *Hargrave's Tracts*, 128.

(b) By foreigners were meant persons not inhabitants.

(c) It appeared from the testimony of one of the witnesses, that a non-resident freeman of *London* being in partnership with a non-freeman, and having a certain share in the trade, such share was exempted from the payment of the port duties at *Dartmouth*; but that those duties were paid by the non-freeman partner for his share.

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Also, that they were exempt at the port of *London*, whether resident or not, from paying toll on corn, and at *Smithfield Market* on the sale of cattle.

On the part of the defendants, there was first produced (a), the record of a fine levied in the 2d year of *Hen. 3.* by *Henry de Hammel* of lastage, in the counties of *Norfolk, Suffolk, and Lincoln.* Next, an (b) *inquisitio post mortem* taken on his death, whereby it appeared that he was seised of lastage in *Lynn*, holden of the crown by the service of keeping the king's falcons; that he died so seised, that his son held it by the same service after his death, and that his wife had an interest in it by way of settlement.

In the 52d year of *Hen. 3.* *Thomas de Hammel* was entered on the roll, in the *Tower*, as holding *in capite*, by the service of falconry, a custom or duty in the port of *Lynn*, of all merchandize, &c. passing that port. It also appeared from that roll, that an action had been brought by *Thomas de Hammel*, against certain persons who had exported goods from *Lynn*, without paying the duty, but in which no determination was to be found. In the 32th year of *Ed. 2.* the then heir of *Thomas de Hammel*, obtained the king's licence to alienate in *mortmain*, and accordingly conveyed the right of lastage in *Lynn* to the *Bishop of Norwich*, in whose successors it continued without interruption, till the 15th year of *Hen. 8.* when a *quo warranto* issued against the then bishop, requiring him to shew his title to the duty in question. The bishop set forth the conveyance to his predecessor from the heir of *Thomas de Hammel*, reciting the right to have been from time immemorial in the family of *De Hammel*. In this suit the right of the bishop was admitted, and confirmed by the attorney general. In the 27th year of *Hen. 8.* a private act of parliament passed, to vest it in the king, who afterwards in the 29th year of his reign, granted it to the corporation of *Lynn*, in whom it continued to the present time. This part of the evidence was founded on the respective records and documents, which were produced duly authenticated.

(c) Several witnesses were then called, who proved that they had for many years paid the duty of lastage at the port of *Lynn*, (*viz.* one penny on the exportation of every quarter of corn,)

(a) Taken from the Chapter House of *Westminster.*

(b) From the Rolls in the *Tower.*

(c) The defendants were not permitted to give in evidence their corporation books to prove their own rights. On their counsel citing the case of the *Mayor of Hull v. Horners, Comp. 102.* (where such evidence was admitted) Mr. Justice *Wilson* said he was counsel in that case, and that the books of the corporation were there produced by consent.

and

and that they had never heard of any exemption, except for the freemen of *Lynn*, and some persons of the borough of *Cambridge* (a). The exemption in favour of *Cambridge*, was by virtue of a special agreement entered into in 1664 between *Cambridge* and *Lynn*, which was read. A lease of tolls made by the corporation of *Lynn*, was last produced, (in pursuance of notice from the plaintiffs,) by which it appeared that an exemption was also allowed to certain persons in the Cinque Ports.

(b) Lord LOUGHBOROUGH, after distinctly recapitulating the evidence, observed to the jury, that as on the part of the defendants, the right to the duty of lastage had been traced up to the family of *De Hammell* early in the reign of *Hen. 3.* and was at that time so established in them, as to be the subject of a family settlement, it was fair to presume (as the counsel for the defendants had contended) that it was vested in them before the time of legal memory. But allowing that presumption, the general right of the corporation of *Lynn* did not destroy the particular exemption proved by the city of *London*, as it had not been shewn that the citizens of *London* ever in fact paid the duty at *Lynn*. The two rights therefore, not being inconsistent, might exist together; the corporation of *Lynn* might have the same right to lastage as the *De Hammells* had enjoyed, but that right might be with an exception in favour of the citizens of *London*; which exception had been clearly proved on the part of the plaintiffs, and not contradicted by the defendants.

His Lordship said, that the other part of the case was resolved into a question, whether the persons mentioned on the record, not being resident citizens of *London*, but in fact residing at *Lynn*, and having lately purchased their freedom for the express purpose of being exempt from lastage at the port of *Lynn*, were entitled to the privilege they claimed. As to this, he stated that the counsel for the plaintiffs had insisted strongly on the parliamentary declaration in the reign of *Hen. 4.* that the freemen of *London* must be there resident to entitle them to an exemption from prisage of wines, but that residence in *London* was not necessary with respect to other franchises. This he said was of consider-

(a) But there was no proof that any freemen of *London*, had ever actually paid it at *Lynn*.

(b) The evidence being closed, much conversation ensued how far non-resident freemen of *London*, and those who had purchased their freedom, were to be considered as citizens within the true meaning of the second issue. On these points the cases of *Manger v. Waller*, 3 Bullf. 1. and *The City of Oxford's case*, 2 Vent. 106. were cited. But as in the form in which the issue stood upon the record; the question was, Whether in point of fact the persons named were citizens or not? It was at length agreed that the matter was proper to be left to the jury.

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able weight; and as the non-resident freemen were liable to serve offices, and bear other burdens in consequence of their freedom, there seemed to be no reason, why they should be deprived of the beneficial rights of that freedom; or why the term *citizens of London* or *men of London* should be confined, to such citizens or men, who were *resident* in *London*, as the counsel for the defendants contended: that in point of fact, this distinction was not made, at *Bristol*, *Newcastle*, or the other places, where the non-resident freemen of *London* were exempted; that the point was given up by the city of *Exeter*, the only place where it had been contested, and the defendant a non-resident citizen of *London*, left in the enjoyment of his right.

Upon the whole therefore his Lordship saw no reason to say, if the jury thought upon the evidence, that the right claimed by the citizens of *London*, and which had been proved to be enjoyed by those who were non-resident, was the same right which the plaintiffs had made out in evidence, that there was any legal ground, which by a legal conclusion, could deprive them of that right.

Verdict for the plaintiffs on both the issues and 1 s. damages (a).

(a) [These damages were remitted on the record; the judgment was "that the citizens and all their goods should be quit of yielding toll." This judgment was reversed in the court of K. B. See 4 Term Rep. B. R. 130. But the judgment of that court was reversed in *Dom. Proc.* and the judgment of the court of C. P. affirmed. See 1 Bos. & Pull. 487. and *Parl. Cases*, 8vo. vol. 7. *titie Toll*, and the notes there. This affirmance in the House of Lords appears however only to have decided the

following points: 1. That this writ would bear a solemn action. 2. That *claim of tolls* was sufficient to sustain the writ. And 3. That the corporation of *London* were sufficiently interested to be plaintiffs. The great point of the right of non-resident freemen was not determined, it not appearing to the judges that there was ground on the record for such a determination. That such non-resident freemen are *not exempt*; See 1 Bos. & Pull. 522 n. and *Parl. Cases*, ubi *supra*. n.]

Friday,

May 8th.

An affidavit of the plaintiff that the cause of action arose where the venue is laid; is not sufficient cause for him to shew against changing the venue. But he must also undertake to give material evidence in that place.

FRENCH v. COPPINGER and Another.

A Rule having been granted to shew cause, why the *venue* should not be changed from *London* to *Cornwall*, on the usual affidavit, *Adair*, Serjt. shewed cause, by producing an affidavit of the plaintiff, stating positively that the action was for money lent in *London*. *Kerby*, Serjt. insisted that this was not sufficient cause, without an undertaking to give material evidence in *London*. *Adair* said, that as the affidavit of the defendant was falsified, the rule could not be made absolute. But

The Court held, that the plaintiff ought to undertake to give material evidence in *London*. On which, *Adair* undertook to give such evidence in *London*, and The rule was discharged.

NUNEZ Administrator of NUNEZ v. MODIGLIANI
and MODIGLIANI.

1789.

Friday,
May 8th.

IN *Easter* term 1788, the plaintiff brought several actions against the defendant and other under-writers, on two policies of insurance; the first effected in the year 1784, on a homeward bound ship of the intestate's, the second in 1785, on the same ship outward bound. The same parties underwrote both the policies. The actions on each, being respectively consolidated, *Nathan Modigliani* was made defendant in the former, and *Hannanel Modigliani* in the latter. The first came on to be tried at *Guildhall* at the sittings in *Hilary* term last, when on application from the defendant's attorney, the cause was put off to a future time, on his consenting to pay the plaintiff the costs of the day; and an order of *Nisi prius* for that purpose, was afterwards made a rule of court.

Several actions brought on two policies of insurance, underwritten by the same parties (among whom are *A.* and *B.*) are respectively consolidated; but in one of the causes which goes to trial, *A.* is defendant, in the other *B.* The plaintiff becomes entitled to costs in one action, and the defendant in the other.

The action on the second policy, was to have been tried at the sittings after *Hilary* term, but the plaintiff withdrew the record, and thereby became, though an administrator (*a*), liable to pay the costs of the action.

The costs taxed and allowed to the defendant, may be set off against those taxed and allowed to the plaintiff.

The costs of the first action, having been taxed and allowed to the plaintiff, a rule was granted to shew cause why the prothonotary should not review his taxation, and why the costs which should be taxed and allowed to the defendant in the second action, should not be set off against those taxed and allowed to the plaintiff in the first.

Against which, *Rond* and *Le Blanc*, Serjts. shewed cause. They urged, that the costs in one action could not be set off against those in another, where there were different defendants. If the defendant had been the same in both, it would alter the case; but costs due from *A.* to *B.* shall not be set off against those due to *A.* from *C.* This would not be authorised by the statutes of set off; and the Court will not interfere and create a set-off which those statutes do not allow: especially as it would tend to take away the attorney's lien.

Lawrence, Serj. was stopped by the Court, who said, that it had been decided in the case of (*b*) *Schoole v. Noble and others* in this court, that an attorney had only such a lien on the costs as were subject to the equitable claims of the parties in

(*a*) *Contrà 2 Cromp. Præd.* 476. 25. therefore?(*b*) *Ante*, 23.

1789.

NUNIZ
v.
MODIGLIANI.

the cause (a). In this case it was consistent with justice to allow the set-off, as the defendant *Nathan Modigliani* was a party to both actions; in one, being made defendant on the record, in the other, being within the rule to consolidate.

Rule absolute.

(a) [See also *Vaughan v. Davies*, vol. 2. p. 440. and *Dennis v. Elliot & al'* vol. 2. p. 587. in which the court affirmed this doctrine; in *Hall v. Ory*, however, (2 Bsf. & Pull. 28.) Lord Eldon, C. J. expressed his surprise at it; and Heath and Root Js. seem inclined to think the practice should be re-considered.]

Friday,
May 8th.

HUBBARD V. PACHECO.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in trover is bad.

A Rule was granted to shew cause why the defendant should not be discharged on entering a common appearance, and the bail bond given up to be cancelled, on the insufficiency of the affidavit to hold to bail, which stated that the defendant was "indebted to the plaintiff in 23l. and upwards in trover." This, *Runnington*, Serjt. who obtained the rule, said was not sufficiently positive, according to the statute (a).

Le Blanc, Serj. shewed cause, arguing that the affidavit would clearly have been good, if it had stated the defendant to have been indebted "for goods converted," &c. and *trover* necessarily implied a conversion. This case differed from that of an affidavit, stating a defendant being indebted "upon promises" because promises may be of various kinds, and therefore the general expression "upon promises" was not sufficiently certain. But

The Court said, that in an affidavit to hold to bail, a word so technical as *trover* ought not to be used.

Rule absolute.

(a) 12 Geo. 1. c. 29.

Monday,
May 18th.

DOWSON V. SCRIVEN.

Where by the terms of a horse-race, the entrance money is to be given to the second-best horse, and it is doubtful on the construction of those terms, whether all the money paid at the entering each horse is to be considered as entrance money; the court will put such a construction on the terms as will include the whole in the description of entrance money to be given to the second-best horse, being most agreeable to the Stat. 13 Geo. 2. c. 29. s. 2. and 7.

THIS was an action for money had and received, tried at *Northampton*, before Mr. Justice *Wilson*, at the Summer Assizes 1788, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case;

On the 17th of *August* 1786, an advertisement appeared in the *Racing Calendar*, giving notice, that on the 29th of that month, "a gentlemen's subscription purse of 50l. would be

" RUN

“ run for in *Norhampton Field*, by any horse, &c. to pay 5 s.
 “ entrance, and if a subscriber, to pay one guinea, or a non-sub-
 “ scriber to pay three guineas into the hands of the clerk of the course,
 “ (the defendant) or double at the post, &c.”

1789.

DOWSON
v.
SCRIVEN.

“ *The entrance money each day to the second-best horse, and to run*
 “ *according to such articles as shall be produced at the time of*
 “ *entrance.*”

“ No less than *three* reputed running horses, to start each day;
 “ if but one horse enter for the gentlemen's purse, to have 10 l.
 “ if two, eight guineas each. If but one enter for the town
 “ purse, to have 10 guineas, if two, five guineas each, and their
 “ entrance-money again. *The winner each day to pay two guineas to*
 “ *the clerk of the course, &c.*”

In consequence of this advertisement, the plaintiff sent a horse to be entered. At the time of the entrance, the articles for the regulation of the course were referred to, which amongst other things directed, the horses “ to carry weights, and observe every article expressed in the advertisement; the second-best horse to have the stakes, being the crowns paid for entrance.”

Three other horses were entered besides that of the plaintiff, and the owner of each paid at the entrance 5 s. and three guineas, into the hands of the defendant as clerk of the course. The race was run, and the plaintiff's horse was second-best; whereupon the defendant tendered him 1 l. as the entrance-money, being 5 s. for each horse. But the plaintiff insisted that he was entitled to the 12 guineas paid into the hands of the defendant, i. e. three guineas for each horse.

Cockell, Serjt. for the plaintiff. This case depends on the construction of the articles for the regulation of the course as applied to the stat. 13 Geo. 2. c. 19. which in the second section enacts that “ no plate, &c. shall be run for, by any horse, &c. “ unless such plate, &c. shall be of the full, real, and intrinsic “ value of fifty pounds or upwards,” and in the 7th section, “ that all and every sum or sums of money, to be paid for entering of “ any horse, &c. to start or run for any plate, &c. shall go and “ be paid to the second-best horse, &c. which shall start or run for “ such plate, &c.”

The object of this statute was first, to prevent races from being run for small sums which had become a national grievance; 2dly, to encourage the breed of horses. The court therefore will endeavour to advance the remedy, by giving full operation to the statute. The question then is, whether the three guineas paid
by

1789. by each horse, were necessary to enable them to start; since if they were, they must be paid to the second-best horse, the 7th section of the statute being directory, that the money shall be paid.

DOWSON
v.
SCRIVEN.

If the money were given for the purpose of qualifying the horses to start, and without payment, no horse were permitted to start, it is immaterial by what denomination it is called: the amount of all and every such sums of money is directed by the statute to be paid to the second-best horse. If the act be not construed in this manner, it might be altogether evaded, by making payment for this purpose, under a different name. Taking the advertisement and articles together, the plaintiff is entitled to the whole money. The advertisement is, "to pay 5s. entrance, and if a subscriber one guinea, or a non-subscriber three guineas, into the hands of the clerk of the course, or double at the post." By fair construction of this sentence the whole is to be considered as entrance-money, the words cannot in any way be transposed to vary the meaning. The paying double at the post, shews it must be to enable the horses to start. For what other purpose could it be paid? It was not for the clerk of the course, for the winner was to pay two guineas to him. It is said, that "the entrance-money shall be paid to the second-best horse," but not that the entrance money was the 5s. The horses were also "to run according to articles to be produced." This expression can only refer to such regulations as respect time, place, distance, and the conduct of the riders, but was not designed to counteract the terms of the advertisement. The articles indeed recognize the advertisement, when they direct that the horses shall "carry weights, and observe every article expressed in the advertisement." If only two horses appear to start, the entrance-money is to be returned; does this mean only the 5s. or the whole they paid at the time of entering? If the articles be explained differently from the advertisement, it would occasion a fraud on those who send their horses to enter, on the faith of the advertisement. Although it is said that "the second-best horse shall have the stakes, *being the crowns paid for entrance*," yet there are no words to restrain the second-best horse from having the guineas. The crowns are given by the words of the articles, and the law appropriates the remainder.

But though the words should be equivocal, the Court will give them a construction most agreeable to the rules of law. Then the act of parliament must decide, which is to be taken
strictly,

strictly, being made for the public benefit. If the 12 guineas be deducted, it will not be a race within the statute, but for less than the *bonâ fide* sum of 50 *l.* and will therefore be void, and a penalty incurred.

1789.

DOWSON
v.
SCRIVEN.

Lawrence, Serjt. for the defendant, argued, that the articles and advertisement made but one contract, the one being to be explained by reference to the other. By the articles the second-best horse was to have the stakes, *being the crowns for entrance*; this proves that the crowns were considered as the only entrance money. The advertisement was ambiguous, till thus explained by the articles. The plaintiff entered his horse with a view only to the 5 *s.* as entrance-money, and took his chance for the whole 50 *l.* As to the act, tho' it was passed to produce beneficial effects to the public, yet it was also meant for the benefit of the "party, and *quisque potest renunciare juri pro se introducto*."

Lord LOUGHBOROUGH.—The plaintiff in this case founds his right to recover, on the advertisement, by the terms of which, each horse was to pay 5 *s.* entrance, and one guinea if a subscriber, if a non-subscriber three guineas. This advertisement refers to certain articles which are called in to explain it. But the validity of them depends on the act of parliament; the parties cannot put a sense on the articles repugnant to the law. I do not think it a question of grammatical construction; by whatever name the money is called, it was in fact entrance-money, since it was necessary to be paid, in order to enable the horse to start. Now the act directs that the entrance-money shall be paid to the second-best horse; but the act would be evaded if this were holden not to be entrance-money, and the articles were to give a different sense to the advertisement.

GOULD, J. of the same opinion.

HEATH, J. of the same opinion.—If the three guineas in the advertisement were explained by the articles, not to be entrance-money, there would be a fraud on the act, which has been construed so strictly, that where a cup of 50 *l.* value was to be run for, it was holden, that the value must be exclusive of the workmanship. Besides, the second-best horse was to have a prize; but if this were not entrance-money, the prize would be that he would pay three guineas and win only twenty shillings.

WILSON, J.—If we construe these articles to mean, that the three guineas for each horse, were to be deducted from the subscription to make up the 50 *l.* plate, we should make the parties

liable

1889.

DOWSON
v.
SCRIVEN.

liable to penalties to the amount of 200 *l.*; we must therefore take it, that they intended to do what the law allowed.

Posted to the plaintiff.

Monday,
May 18th.

Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. Neither will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as in case of a non-suit, on account of the plaintiff's not proceeding to trial.

IFIELD v. WEEKS, and another.

ROOKE, Serjt. moved for a rule to shew cause, why the prothonotary should not review his taxation of costs, on the following circumstances.

In *Michaelmas* term last, a rule for judgment as in case of a non-suit was obtained by the defendant, the plaintiff not having proceeded to trial at the assizes at *Gloucester*, according to a peremptory undertaking. On taxing the costs the prothonotary refused to allow the expences which the defendant had incurred, in attending at the assizes, subpoenaing witnesses, seeing counsel, &c. in expectation that the plaintiff would try the cause; and the reason of his refusal was, that no notice of trial had been given.

In support of the motion, *Rooke* cited 2 *Barnes*, 252., and said, that as the plaintiff had peremptorily undertaken to proceed to trial at the assizes, the defendant was under the necessity of attending, and being ready prepared with his witnesses and counsel. But,

The Court refused the rule, saying it was the settled practice, that notwithstanding a peremptory undertaking to try, it was necessary to give notice of trial; without which the defendant was not bound to take the steps, which he had taken in this case (a).

(a) [See *Jacks v. Meyer*, 8 Term Rep. B. R. 245.]

Monday,
May 18th.

It is irregular if a *capias* be served after the date of the return, and if there be not 15 days between the *teste* and return (a). But if the defendant take the declaration out of the office

WHALE v. FULLER.

COCKELL, Serjt. obtained a rule to shew cause, why the *capias* should not be set aside, together with all the subsequent proceedings, for the following irregularities, viz. That the service of the writ was after the date of the return, and that there were not 15 days between the *teste* and return. These were holden to be irregularities.

But *Marshall* Serjt. shewed for cause, that the defendant had taken the declaration out of the office; which he contended, was a waiver of all preceding irregularity.

he thereby waives all preceding irregularity.

(a) [But see post, 291. and 1 B. & P. 342. that the *capias* may be amended.]

The court being of this opinion, discharged the rule with costs. 1789.

WHALE
v.
FULLER.

Monday,
May 18th.

BROWNE v. MARSDEN and others.

THIS cause being at issue, the parties submitted to arbitration.

The arbitrator awarded to the plaintiff 24 *l.* damages, and the "costs by him sustained in the said action to be taxed by the proper officer."

The prothonotary having refused to allow the costs of the reference, or any other except those of the action, as between party and party; *Cockell* Serjt. moved for a rule to shew cause why he should not tax and allow the costs of the reference, together with the costs of the action, as between attorney and client.

But the court said there was no precedent for the costs of the reference to be included in an award of costs of the action; and having examined the award, the words of which were as above stated, held that those words were confined to the costs of the action, and therefore

Refused the rule (a).

(a) [See *Willen's Rep* 64; 1 B. & P. reference does not include the costs of the 34. that the general term costs in a rule of award.]

An award of
"costs sus-
"tained in
"the ac-
"tion" does
not include
the costs of the
reference.

DOE on the several Demises of BURKITT and Ux.
and others v. CHAPMAN.

Friday,
May 22d.

THIS was an ejectment tried at *Kingston* at the last assizes, when a verdict was found for the plaintiff, subject to the opinion of the court on the following case:

Mary Chapman, spinster, on the 29th of *June* 1778, made her will, duly executed for passing real estates, and thereby gave, devised, and bequeathed all and every the real estate or estates, which she was any ways seized of, interested in, or intitled unto, late the estate of *William Newson*, to *Charles Darby* and *John Warner*, for and during their natural lives, and the life of the longer liver of them, and after the death of the survivor of them she gave and devised the same unto *William Dobson*, his heirs and assigns for ever.

A devise of
"all the rest
"and residue
"of my es-
"tate of
"what na-
"ture or
"kind
"soever,"
includes real
as well as
personal
property,
though ac-
companied
with limita-
tions pecu-
liarily appli-
cable, and

usually applied to personal property alone. [See *Dally v. King*, ante, *pa.* 1. of this volume, and the note there; and also *Smith & al' v. Coffin & Ux.* post, vol. 2. p. 447.]

She

1789. She also gave, devised, and bequeathed a messuage at *Chertsey* unto her cousins *Anthony Chapman* and *Richard Chapman*, their heirs and assigns, for ever, to hold as tenants in common, and not as jointenants.

Doe
v.
CHAPMAN.

She also gave and devised unto *Catherine Chapman*, for and during the term of her natural life, another messuage in *Chertsey*; and after her decease she gave and devised the same unto the said *Anthony Chapman*, for his life; and after his decease, she gave and devised the same to her cousin *George Eves*, his heirs and assigns for ever.

She then gave several pecuniary and specific legacies, and afterwards devised and bequeathed as follows:

All the rest and residue of my estate, of what nature or kind soever, I give, devise, and bequeath, unto my aunt Catherine Chapman, for, and during the term of her natural life, and after her decease, my mind and will is, and I do hereby direct, that the same and every part thereof, be equally divided between my said cousins, Catharine Burkitt, Ann Hodgson, Elizabeth Hobson, and Rebecca Maynard, and the child of my late cousin Sarah Hodgson, share and share alike; and in case either of them my said cousins shall happen to die, before he, she, or they shall be entitled to have and receive, his, her or their said share, the child or children of either of my said cousins so dying shall stand in the place of his, her, or their parent; and have such share as his, her, or their parent would have been entitled to; and I direct, that the share which the child of my late cousin Sarah Hodgson, and also the share or shares of the children of either of them my said cousins so dying as aforesaid, shall be paid to the guardian of such child or children, and the receipt of such guardian shall be a sufficient discharge for the same.

The testatrix then gave to *John Thody Hodgson*, the child of her cousin *Sarah Hodgson*, the sum of 50*l.* over and above what he might be entitled to; and appointed *Anthony Chapman* executor of her will.

She died soon after making the said will, seised of eight acres of freehold, and four of copyhold lands of inheritance, in the parish of *Chertsey*, which were the lands in question, and not particularly devised by the will. She duly surrendered the copyhold to the use of her will.

Anthony Chapman named in the will, the defendant in the present action, was her heir at law.

The testatrix's aunt *Catherine* died after the testatrix, and during her life enjoyed the land in question.

DOR
v.
CHAPMAN

Thomas Burkitt and *Catherine* his wife, *Anne Hodgson* widow, *William Hobson*, and *Elizabeth* his wife, *Elizabeth Maynard* an infant, the only child of *Rebecca Maynard* deceased, and who died after the testatrix, (which said *Catherine*, *Anne*, *Elizabeth Hobson*, and *Rebecca*, were the cousins of the testatrix, named in the residuary clause,) and *John Thody Hodgson* an infant, the only child of the testatrix's late cousin *Sarah Hodgson*, (also named in the residuary clause,) were the lessors of the plaintiff.

The question was, Whether they were intitled to recover the abovementioned eight acres of freehold, and four of copyhold lands of inheritance?

Runnington, Serjt. on behalf of the lessor of the plaintiff, made two questions. 1. Whether it was not the intention of the testatrix to pass all her property? 2. Whether lands not specifically devised should not pass under the residuary clause? The affirmative of both these questions was clear. The testatrix takes notice of all her relations. She gives an estate for life to *Charles Darby* and *John Warner*, with remainder to *William Dobson* in fee. She also gives a messuage at *Chertsey* to her cousin *Anthony Chapman* and *Richard Chapman* as tenants in common. Here were two instances of her particular bounty. The only lands not specifically devised were about eight acres, which must be taken to pass by the words "all the rest and residue of my estate of what kind soever" and be equally divided between her cousins; both because it was evidently her design not to die intestate as to any of her property, and because those words are so comprehensive as to include all of which she was possessed. That the word estate will pass a fee-simple is too well established to be disputed, 3 *Mod.* 45.—6 *Mod.* 106.—2 *Vern.* 564.—*Prec. Chan.* 264.—2 *P. Wms.* 525.—1 *Term Rep. B. R.* 411.—2 *Term Rep. B. R.* 656. & *Tilly v. Simpson* there cited.

Lawrence, Serjt. for the defendant admitted the rule of law, that the word "estate" was sufficient to pass a fee-simple, unless restrained by other words; but contended that the intention of the testatrix was to give her personal estate only to her cousins by the residuary clause. The heir at law is not to be deprived of his inheritance, except by express words or necessary implication. Where words are used, which may be applied indifferently, either to real or personal property, they shall not be ap-

1789. *Doe v. Chapman* plied to real, to the disherison of the heir. 12 *Mod.* 592. As to the argument that it was not the intent of the testatrix to die intestate as to any part of her property, there is no introductory clause from which so much is to be collected. Nor does it appear, that her design was to divide all her property equally among her relations; because the value of it is not ascertained. When she meant to give a real estate, she used technical terms for that purpose. She devises the *real estates* of which she was seised, to *Charles Darby* and *John Warner*, for their lives; and after the death of the survivor of them to *John Dobson*, his heirs and assigns for ever. She also gives a messuage at *Chertsey* to *Anthony Chapman* and *Richard Chapman* their heirs and assigns for ever, to hold as *tenants in common*, and not as *joint-tenants*. These are phrases peculiarly applicable to real property. She then comes to dispose of her personalty, for which purpose the clause is introduced on which the question arises. If this clause had stopped at the words "*estate, &c. to Catherine Chapman*" it would certainly be a devise of real property, but it goes on to direct that the same shall be equally divided between her cousins, and that the child or children of such as should happen to die, should stand in the place of his, her, or their parent, and have the parent's share. Now this could only respect personal property, since the children would inherit the parent's share of a real estate, without any provision of this kind. These shares are likewise to be paid to the guardians of such children, and the receipt of such guardians to be a discharge. Now such payment and receipt are appropriated to personal estate. The words also "of what kind soever" may well be satisfied, by being applied to personal property, which consists of various species.

Runnington was going to reply, when he was stopped by

Lord LOUGHBOROUGH, who said, that as the testatrix had two kinds of estates, namely, real and personal, to which the words "all the rest of my estate of what kind soever" might be applied, the Court could not restrain the meaning of them to personal property, and negative the operation of them as to real estates, particularly, as they were so general and comprehensive.

GOULD and HEATH, J. of the same opinion.

WILSON, J.—It was plainly the intention of the testatrix, not to die intestate as to any part of her property, since it appears

appears on the case, that she had surrendered her copyholds to the use of her will.

1789.

Postea to the plaintiff (a).

Doe
v.

(a) *Vide ante*, 2. *Dally v. King*, 3 *Atk.* 486. *Ridout v. Pain*.

CHAPMAN.

ORR v. CHURCHILL.

Saturday,
May 23d.

DEBT on bond, dated *Fort William, Bengal, March 14th, 1787*, in the penalty of 4470l. 2s. 2d. of lawful money of Great Britain.

Plea, Oyer of the bond, by which it appeared that the defendant *Walter Cleland*, and *Daniel Stewart* were jointly and severally bound to the plaintiff *John Orr*, captain in the military service of the United Company of merchants of *England* trading to the *East Indies*, on their *Madras* establishment. Oyer also of the condition, which was as follows:

"Whereas the above bounden *Walter Cleland* hath received from the above named *John Orr*, 6017 star pagodas of lawful money of *Madras*, for which he was to have obtained and given to the said *John Orr* bills of exchange to be drawn by the right honorable the governor in council of *Fort William* in *Bengal* aforesaid, upon the honorable court of directors of the said united company of merchants of *England*, which bills he hath not obtained or given, but instead thereof hath granted two sets of his own private bills upon Messrs. *Baillie, Pacock, and Co.* payable to the order of the said *John Orr*, in manner herein after mentioned; that is to say, one set in triplicate dated *Calcutta, January 29th, 1787*, for 2044l. 3s. 4d. payable 365 days after sight thereof, and the other set in triplicate, bearing even date with these presents, for 190l. 18s. 9d. payable four months after sight thereof; and to secure the due acceptance and payment of such bills respectively, they the said *Henry Churchill* and *Daniel Stewart* have proposed and undertaken to become bound together with the said *Walter Cleland*, and that in the event of the said bills or either of them being protested for non-acceptance and non-payment, that they the said *Walter Cleland, Henry Churchill, and Daniel Stewart*, or one of them, their or one of their heirs, executors, or administrators, shall and will upon producing to them or either of them such bill with its protest,

A bond is given from A.B. and C. to D. reciting that "A. having received from D. a certain sum of money in the East Indies, had drawn bills of exchange there payable to D. on a house in England, and that the obligors had agreed with D. if the bills should not be accepted and paid that they would pay the amount thereof, with interest from the day of their respective dates by way of penalty; with a condition to be void if the bills should be accepted and paid according to the tenor thereof.

On non-payment of the bills D. is entitled to recover no more than the amount of them, with interest from the time of their becoming due.

Q 2

" well

1789.

ORR
v.
CUNNINGHAM
ILL.

“ well and truly pay to the said *John Orr* or his order, if demanded in *England*, the full amount of such bill or bills, which shall be so protested, together with *interest thereupon of 5 l. per centum per annum, from the day of the date or dates of such bill or bills up to the day of such payment ‘ by way of penalty ;’* and if demanded in *India*, then the full amount of such bill or bills in *Pagodas*, at an exchange of seven shillings and four-pence for each *Pagoda*, with an *interest thereupon of 10 per cent. per annum, from the date or dates of such bill or bills up to the day of such payment ;* and with which proposal and undertaking the said *John Orr* is satisfied. The condition therefore of this obligation is such, that if the aforesaid bills of exchange so drawn by the said *Walter Cleland* upon Messrs. *Baillie, Pocock, and Company*, merchants in *London*, shall be duly and faithfully accepted and paid according to the tenor thereof, then this obligation shall be void and of no effect, otherwise the same shall be, and remain in full force and virtue.” Which being read and heard, the said *Henry* saith that the said *John* ought not to have or maintain his aforesaid action against him, because he saith, that he the said *Henry*, before the suing forth of the original writ of the said *John* on this behalf, to wit, on the 16th day of *October*, in the year of our Lord 1788, at *London* aforesaid, in the parish and ward aforesaid, (one, to wit, the third of the said set of bills of exchange in the said condition mentioned, to be granted in triplicate for 190 l. 18 s. 9 d. being then and before that time protested for non-acceptance and non-payment thereof,) did upon producing to him such bill with its protest, well and truly pay to the said *John*, (the same being then and there demanded in *England*,) the full amount of such bill so protested, together with *interest thereupon of 5 per cent. per annum, from the day of the date of such bill, up to the day of such payment “ by way of penalty,”* according to the tenor, form and effect of the said condition ; and that the said set of bills of exchange in the said condition mentioned to have been granted as aforesaid, in triplicate, for the said sum of 2044 l. 3 s. 4 d. were not, nor were, nor was, any or either of that set of bills of exchange presented to the said Messrs. *Baillie, Pocock, and Company*, in the said condition mentioned, for their acceptance thereof, and the said Messrs. *Baillie, Pocock, and Company*, never had sight of the same, or any, or either of those last-mentioned bills, and this, &c. 2d, That the said *Henry*, before the suing forth of the original writ of the said *John* in this behalf,

half, to wit, on the 16th day of *October*, in the year of our Lord 1788, at *London* aforesaid, in the parish and ward aforesaid, (one, to wit, the third of the said set of bills of exchange in the said condition mentioned, to be granted in triplicate for 190*l.* 18*s.* 9*d.* being then, and there, and before that time *protested for non-acceptance and non-payment* thereof,) did upon producing to him such bill with its protest, well and truly pay to the said *John*, (the same being then and there demanded in *England*,) the full amount of such bill so protested, together with interest thereupon, at 5 *per cent. per annum, from the day of the date of such bill up to the day of such payment, "by way of penalty,"* according to the tenor, form and effect of the said condition; and that the said set of bills of exchange in the said condition mentioned to have been granted as aforesaid, in triplicate, for the said sum of 2044*l.* 3*s.* 4*d.* were not, nor were, nor was, any or either of that set of bills of exchange *protested for non-acceptance or non-payment* thereof, according to the tenor, form and effect of the said condition, and this the said *Henry* is ready to verify, wherefore he prays judgment, &c.

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Replication, 1st, That the third of the said set of bills of exchange in triplicate, for the sum of 2044*l.* 3*s.* 4*d.* on the 29th of *November* 1787, was *presented* to Messrs. *Baillie, Pocock, and Co.* for acceptance, &c. on which issue was joined. 2d, That the same, on the 29th of *September* 1788, was duly *protested for non-payment* thereof, &c. on which also issue was joined. After which the following suggestion was entered:

"And the said *John* for breach of the condition of the said writing obligatory, suggests to the court here, according to the form of the statute in such case made and provided, that the said several bills of exchange so drawn by the said *Walter Cleland* upon the said Messrs. *Baillie, Pocock, and Co.* merchants in *London*, were not, nor was any or either of them duly paid according to the tenor and effect thereof; and that the third of each set of the said several bills of exchange was duly presented for payment to the said Messrs. *Baillie, Pocock, and Co.*, and being protested for non-payment thereof, was afterwards produced to the said *Henry*, who then and from thenceforth hath refused to pay the said bills, or any or either of them, and that the said bills still remain wholly unpaid and unsatisfied." Therefore as well to try the truth of the issues above joined, as to enquire the truth of the premises above suggested by the said *John*, and to assess what damages he hath sustained by reason of the breach

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ILL.

of the said condition above assigned, according to the form of the statute in such case made and provided, the sheriffs are commanded that they cause to come, &c.

At the trial a verdict was found for the plaintiff, on both the issues; an order of *nisi prius* being made, "that with the consent of all parties, a verdict should be found for the plaintiff, for the sum of 1459*l.* 13*s.* and 40*s.* costs; subject to the opinion of the Court, whether he ought to recover that sum, or only the sum of 1275*l.* 16*s.* 3*d.* &c.

On behalf of the plaintiff, *Runnington* and *Lawrence*, Serjts. stated the question in this case to be, Whether interest on the bills was to be charged from the day of the date, or from the day when they became due?

The Court will give every legal effect to the agreement as a security for the plaintiff. By that agreement, if the bills were protested in *England*, whether it were for non-payment, or non-acceptance, 5 *per cent.* was to be paid from the day of their respective dates. This undertaking is express, which the Court will not interfere to set aside. So if two parties enter into an agreement to build a house, under a penalty or the like, for non-performance, in strict law the whole penalty may be recovered. If this were an action on the case the Court might measure the damages, but being debt on bond they have no such power at common law. Though without an express agreement, interest would only run from the time of the bills being due, yet this agreement came in expressly to give interest from the date. The damages were thereby liquidated. There was nothing illegal or usurious in the transaction, and where there have been no symptoms of usury, agreements of this kind have been carried into effect by courts of law. 2 *Burr.* 1094. *Dougl. (a)* 376. 2 *Term Rep. B. R.* 52. But it was doubted at the trial, whether the words "by way of penalty," did not bring the case within the statute, 8 & 9 *W. 3. c. 11.* Now that statute gives a court of law the power of a court of equity in this respect, namely, to proportion the damages. The question therefore is, What a court of equity would do on the circumstances of this case? *Orr* supplies *Cleland* with money, in order to have bills on the *East-India* Company. Those bills are not procured, but others given on a private house. If *Orr* had remained in *Bengal*, he might have required payment of his

(a) Last edition.

money

money from *Cleland*. It must be considered as a loan advanced, or that *Cleland* was guilty of a breach of trust, in not performing what he undertook. In either case, in point of conscience, *Orr* would be entitled to interest from the time he parted with his money. Then he agrees to give up this interest, if the bills were paid when they became due: but if they were not paid he is in that event to have the same interest which he would have had, if he had not paid the money to *Cleland*. This is the meaning of the agreement, and is perfectly fair and conscionable. The mere insertion therefore of the words "by way of penalty" would not be a ground for a court of equity to interfere, for if those words were left out, the plaintiff would in conscience be intitled. 1 *Vgn.* 210. 2 *Vern.* 316. 3 *Blac. Com.* 432.

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Cockell, Serjt. for the defendant. The situation of the parties is to be considered. *Orr* and *Cleland* were both coming to *England*; *Orr* was desirous to remit money from *India*; his only object was the security of his property; provided the bills were good, it was immaterial to him on what persons they were drawn. Neither would *Cleland* have given the bills, unless he had received the money. The advantage therefore was equal to both parties; one had a safe way of bringing home his property, and the other had the money advanced to him. All arguments then drawn from the circumstance of the money being advanced to *Cleland*, must be laid out of the case.

When the bills could not be procured on the *East-India* Company, those on *Baillie* and Co. were offered by *Cleland*, but which were not received by *Orr*, without an additional security. The only intent of the parties was that *Orr's* money should be safe. The condition is, that the bond shall be void on the payment of the bills according to the "tenor thereof respectively," all the rest is mere recital. The words "by way of penalty" were added *in terrorem*. (a) If it were meant as a satisfaction, or in the nature of liquidated damages, the penalty would have been proportioned to the delay of payment. If it were strictly construed by the delay of one day only, it would be forfeited, as much as if the delay had been for any longer time. It was not the design of the agreement that *Orr* should have any extraordinary advantage: he was only to have his money when it was due; but not to receive interest in the mean time. The intent of the parties therefore must prevail; the money being paid to the plaintiff, the for-

(a) Vide 2 *Term Rep. B. R.* 32.

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ILL.

The Court took time to consider till this day, when judgment was delivered as follows, by

LORD LOUGHBOROUGH.—We are all agreed in this case, in which the question is, Whether the verdict shall be entered for the whole sum at which the damages are assessed by the consent of the parties, namely, 1459 *l.* or 1275 *l.* 16 *s.* 3 *d.* the difference of the two sums being owing to the computation of interest from the date of the bills of exchange? It was argued that the verdict ought to go to the full extent, because by agreement of the parties, the damages were liquidated, and that this was not in the nature of a common penalty, but the damages being ascertained, neither a court of law nor of equity would relieve.

But I do not go on the denomination given by the instrument, for whatever that may be, in this case there could not by any possibility have been an agreement for liquidated damages; which can only be, where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard against the performance of acts, which if done would also be injurious. In such cases an estimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foresee the consequences of a breach of the engagement, and stipulate accordingly. But where the question is concerning the non-payment of money in circumstances like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages: otherwise the law might be eluded by the parties. It may often indeed happen, that the damages sustained by a party contracting, by the non-payment of money at the time agreed on, may by the particular arrangement of his affairs, be greater than the compensation recovered, by computing the interest: but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value. In this transaction, the money was not a loan to the defendant, to remain in his hands in *India*, and be re-paid to the plaintiff at certain stated times; but it was paid merely for the purpose of being remitted to *Europe*. That it was so paid, clearly appears from that part of the agreement, which provides, that if the bills were sent back unpaid to *India*, the amount of them should be paid to the plaintiff in *Pagodas*, at an exchange of 7 *s.* 4 *d.* for each *Pagoda*, and 10 *l.* *per*

per cent. interest; which must be on account of the difference of exchange. When the plaintiff could not procure bills on the *East India* Company, he had others on a private house, and as a security took a bond from the defendant with two other persons to answer the value of them. But for the reasons I have stated, we think that value must be calculated from the times when the bills became due; that the verdict must therefore be reduced, and entered for the lesser sum.

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v.
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ILL.

FOWLDS v. MACKINTOSH.

Monday,
May 25th.

THE defendant being arrested on a *capias* for “50*l.* and upwards,” found bail, who joined with him in the usual bond, in the penalty of 100*l.* No bail above being put in, an attachment was granted against the sheriff of *Middlesex*, for not bringing in the body pursuant to a rule of Court. Upon which a rule was obtained to shew cause why the attachment should not be set aside, on the payment of 50*l.* 19*s.* together with costs; it appearing from the affidavit of the sheriff’s officer, that he had tendered that sum and the costs to the attorney for the plaintiff, who refused to take less than 68*l.* 2*s.* 6*d.* the real amount of the debt.

The court will not discharge an attachment against the sheriff for not bringing in the body except upon payment of the whole debt due and costs, beyond the sum sworn to and indorsed on the writ.

Against the rule *Marshall*, Serjt. shewed cause. The question is, to what extent the sheriff is answerable for not bringing in the body? This must be the same as that to which bail are answerable. Before the *stat. 23 Hen. 6. c. 9.* the sheriff was not bound to take bail, unless the party sued out a writ of mainprize. He might indeed have taken bail, but he was obliged at his peril to produce the body at the return of the writ; otherwise he was guilty of a contempt, for which he was amerced. Since that statute, the sheriff is bound to let the party to bail, if good bail be tendered; but he is not obliged to take bad bail, and is therefore still required to have the body in Court at the return of the writ, as at common law. If the defendant be arrested and admitted to bail, the plaintiff has his option, either to have an assignment of the bail bond, or if he dislikes the sureties taken, he may proceed against the sheriff to compel him to bring in the body; or rather, to put in and justify good bail to the action, which is equivalent to bringing in the body. If the plaintiff accepts an assignment of the bail bond, he admits the sufficiency of the sureties, and waives his remedy against the

the

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v.
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TOEN.

the sheriff. If the plaintiff chooses to proceed against the sheriff, he obtains an order upon him to return the writ, who may then either refuse to return it, or return *non est inventus*, or *cepi corpus*. If he refuse to return the writ, the Court will grant an attachment against him, and amerce him for his disobedience. If he return *non est inventus*, the plaintiff may bring an action against him for a false return, and recover the whole debt. If he return *cepi corpus*, the writ and return being filed of record, the plaintiff may serve him with a rule to bring in the body, at the expiration of which, if good bail be not put in and justified, (which is equivalent to bringing in the body,) it will then appear, that the sheriff has not only disobeyed the writ, but also the order of the Court; and accordingly the Court will attach him, and amerce him at their discretion, for his disobedience of the writ, and contempt of the Court. But in such case, the object is that the plaintiff shall be satisfied; this is the measure of the punishment. The question then is, What ought to be deemed a sufficient satisfaction to the plaintiff? It seems, that the sheriff ought to be liable to the same extent as the bail, because as he is bound to take good and sufficient bail, he is answerable for their insufficiency. It would be also absurd to say, that the plaintiff has his option either to proceed on the bail bond, or against the sheriff, if the latter remedy were not as extensive as the former. But it has lately been decided in this Court (a), that the bail are liable to the full extent of the penalty of the bail bond, to satisfy the debt really owing to the plaintiff. If the sheriff had done his duty, good bail would have been put in and justified, from whom the plaintiff would have recovered his whole debt and costs. But the sheriff has taken upon himself to compromise the plaintiff's cause, and say what sum he ought to recover. It would hold out a great temptation to perjury, if the plaintiff were to lose a part of his just demand, by his moderation and caution in swearing to it. If the sheriff has taken sufficient bail, he is secure, they being answerable to him: if they be insufficient, he ought to be answerable to the plaintiff for their insufficiency. In this case, the sheriff's officer had notice how much was really due; but the sheriff was liable without such notice. The officer adds 19s. to the sum sworn to, in order to satisfy the word "upwards" but he had no right to decide, how much above 50*l.* was due.

(a) *Mitchell v. Gibbons*, ante, 76. 1 *Barnes*, 74.

Bond, Serjt. on the part of the sheriff, said that there was no authority decided on this point, which was new. The case of *Mitchell v. Gibbons* proves only to what extent bail are liable, but does not affect the sheriff. In this case the sum sworn to had been tendered with the costs, which ought to be deemed satisfactory. By the statute 12 *Geo. 1. c. 29.* the sheriff is prohibited from taking bail for more than the sum sworn to.

Lord LOUGHBOROUGH.—It would be strange if the sheriff should be allowed to put himself in a better situation than the bail. The case of *Mitchell v. Gibbons* was determined on consideration, and on the practice established for a length of time. I do not see how the situation of the sheriff in this respect, is to be distinguished from that of the bail.

GOULD, J.—By the course of this Court, where a party comes himself and enters into a recognizance with the bail, he is bound in double the sum, and each of the bail in the single sum; then each is liable to the full extent; and the same rule should prevail in bail bonds taken to the sheriff.

HEATH, J. of the same opinion.

WILSON, J.—The sheriff may if he pleases bring in the body; he ought to put the plaintiff in the same situation as if good bail were put in and justified. If he does not return the writ and is attached for contempt, he shall not put the plaintiff in a worse situation. Nor can the plaintiff otherwise recover the remainder of his debt.

The Court then ordered, that the rule for setting aside the attachment should not be discharged except on payment of the whole debt and costs, together with the costs of the application.

CLARK v. NORRIS and his Wife.

BOTH the defendants being joined in the writ, the husband entered an appearance for himself only. The plaintiff afterwards signed judgment for want of a plea, without making a demand of a plea. For which irregularity, *Lawrence*, Serjt. moved to set aside the judgment.

Marshall, Serjt. contended that the judgment was regular, because the husband not having appeared for himself and his wife, as required by the notice affixed to the process, it was the same as if no appearance had been entered, and therefore no demand of a plea was necessary.

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Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; and in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea.

But

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TOSH.

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But the Court held the judgment to be irregular, and therefore made the rule absolute to set it aside.

CLARK

v.

MORRIS.

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A contract
made by two
partners to
pay a certain
sum of money
to a third person
equally out
of their own
private cash,
is a joint
contract,
and they
must be
jointly sued
upon it.*

BYERS, Widow, v. DOBEY.

ASSUMPSIT for the use and occupation of a shop, counting-house, and chambers, part of a messuage, with the appurtenances, &c. *Quantum meruit*—money paid, laid out, and expended—money lent and advanced—money had and received. Damages 200*l*.

Plea in abatement, "That the promises, &c. if any, were made by the defendant and one *George Bethell* jointly, and not by the defendant only, &c."

Replication, that they were made by the defendant only, and not by him and the said *George* jointly, &c. on which issue was joined, and a verdict found for the defendant.

The material facts of the case were these :

By articles of partnership entered into in 1774, between *David Humphries* of the one part, and *Richard Byers*, (husband of the plaintiff,) *John Dobey*, (the defendant,) and *George Bethell* of the other part ; it was agreed, amongst other things, that *Byers, Dobey*, and *Bethell*, should carry on in partnership the trade of a hosier for 14 years, and purchase the stock in trade, utensils, and fixtures, of *Humphries* : that *Humphries* should grant to *Byers* a lease of the house, &c. where the business was carried on for 21 years, at the rent of 50*l*. clear of all taxes, payable quarterly, by and out of the private cash of *Byers* ; in which lease, a room should be reserved for the use of *Humphries* during his life, and after his death, for the use of *Byers* ; that the business should be carried on by *Byers, Dobey*, and *Bethell*, in the shop and other parts of the house, as it had before been done by *Humphries* : that *Byers* and his family should live in the house : that *Byers* should during the partnership, as a compensation for the use of the shop and premises, be paid equally by *Dobey* and *Bethell*, out of their own private cash 25*l*. yearly by quarterly payments, and that they should pay *Byers* a moiety of all taxes whatsoever, for or on account of such house and premises : that if either of the partners should die and leave a widow, she should, if she chose, be taken into the partnership for the remainder of the term ; that if *Byers* should leave a widow, and she should continue in the business with the surviving partners,

ners, then she should hold the said house upon the same terms and conditions as he would have holden it, if he had been living, &c.

Byers died in 1778, his widow the plaintiff continued in the partnership with the defendant and *Bethell*, till the expiration of it, when she brought this action to recover 12*l.* 10*s.* half of the annual rent of 25*l.* (for the use of the house, &c. which was to be paid equally out of the private cash of the defendant and *Bethell*, according to the articles), together with the rent for part of a year preceding the expiration of the partnership, and half of one moiety of the taxes, as the defendant's share under the articles.

A rule having been granted to shew cause why the verdict should not be set aside, and a new trial granted;

Bond, Serjt. shewed cause, and contended the words "*to be paid equally*," made *Dobey* and *Bethell* joint-tenants and not tenants in common. This construction would be put on the like words in a deed; and if words of grant be thus construed, so also ought words of render. Although in wills, and deeds of conveyance under the statute of uses, these words would make a tenancy in common, yet in deeds at common law, they make a joint-tenancy. 1 *Salk.* 390. *Ward v. Everard*.

Watson, Serjt. for the plaintiff, argued, that as the money was agreed to be paid "out of the private cash" of *Dobey* and *Bethell*, it was to be paid by them separately, and not out of the joint stock. There could be no joint private cash. The expression "*to be paid equally*," could only mean that each should pay a moiety of 25*l.* and the words "*private cash*," shew that they were individually answerable.

LORD LOUGHBOROUGH.—If one of them had died, would *Byers* have been entitled only to 12*l.* 10*s.*? The interest in the trade would have survived, yet according to the argument of the plaintiff, though that interest would have survived to the partnership, *Byers* would have been reduced to 12*l.* 10*s.* It was in its nature a joint undertaking.

GOULD and HEATH, J. of the same opinion.

WILSON, J.—The words *private cash* could only mean, that the rent should not be paid out of the partnership stock: but the contract was joint between *Dobey* and *Bethell* as relating to a third person.

Rule discharged.

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v.
DOBEY.

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Where in a plea by an executor of a former judgment recovered, by mistake a less sum is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the court will permit the defendant to amend the record by inserting the real sum in the plea, though the application be not made for such amendment till a considerable time, (ex. gr. near three years after) the record has been made up; and they will in such case allow the plaintiff to reply *per fraudem*.

SKUTT v. WOODWARD Executrix of WOODWARD.

TO this action which was brought in *Michaelmas* term 1786, for money had and received by the testator, the defendant pleaded :

1. The general issue. 2. *Plene administravit*. 3. That one *Catharine Simmons*, in that term recovered judgment against her as executrix for six pounds, and *plene administravit* except 50 s. which were not sufficient to satisfy that judgment, &c.

Replication. Issue joined on the 1st plea. As to the 2d and last pleas, inasmuch as the plaintiff cannot deny the several matters therein contained, and inasmuch as the defendant hath not in and by her said last-mentioned pleas, &c. denied the action of the plaintiff, &c. the said plaintiff prays judgment of assets, which after satisfying the said judgment, shall come to the hands of the defendant, &c. therefore it is considered, &c. But because it is unknown what damages, &c. and because it is convenient and necessary, that there should be but one taxation of damages in this behalf, therefore let such taxation be staid until the trial of the issue above joined between the parties aforesaid, &c. Verdict for the plaintiff, 72 l. damages and 40 s. costs, and 25 l. 10 s. increased costs, which damages in the whole amount to 99 l. 10 s. Judgment of assets *quando acciderint*, after satisfying the aforesaid judgment in form aforesaid recovered; and if the said defendant hath not so much in her hands to be administered, the aforesaid 40 s. and 25 l. 10 s. amounting together to the sum of 27 l. 10 s. to be levied of the proper goods and chattels of the said defendant, and the said defendant in mercy, &c.

In this term, a rule was obtained to shew cause, why upon payment of costs, the defendant should not have leave to amend the record, by inserting in the 3d plea, "*two hundred and four pounds*" instead of "*six pounds*;" affidavits having been previously filed, of *Catharine Simmons*, the defendant and her present attorney, stating that the former judgment was in fact for 198 l. 5 s. and 6 l. costs, that by mere mistake of her former attorney, the sum of 198 l. 15 s. the amount of the damages recovered, was omitted in the plea, and 6 l. alone stated, which was in truth only the sum at which the costs were taxed: and that it appeared from a search in the office, that the judgment

ment was entered in the docket book for 1981. 15 s. by confession. There were also affidavits on the part of the plaintiff tending to induce a suspicion that the judgment was obtained by collusion.

Adair, Serjt. now shewed cause, urging, that it would afford a dangerous precedent, if at this distance of time, a record regularly made up, without any error on the face of it, should be altered: such a proceeding, he said, would tend to shake the credit of all judgment securities.

The Court seemed to doubt about the propriety of allowing the amendment proposed; but as the substantial justice of the case was in favour of the defendant, leave was given to her to amend the plea, and to the plaintiff to reply *per fraudem*.

On these terms the rule was

made absolute.

ISRAEL v. DOUGLAS and Another.

Monday,
May 25th.

THE material facts of this case were as follow:

The defendants who were partners, were indebted to one *Delvallè*, a broker, in 64 l. 9 s. for brokerage, and *Delvallè* was indebted to the plaintiff in 40 l. on a promissory note. *Delvallè* afterwards applied to the plaintiff to lend him a further sum, which the plaintiff refused to advance without security; whereupon *Delvallè* gave him an order on the defendants for the sum in which they were indebted to him (*Delvallè*) for brokerage. This order was sent by the plaintiff to the defendants in *November* 1787, with a request that they would acknowledge their having given him credit for it. The defendant *Douglas* answered that they would pay the money which they owed to *Delvallè* to no other person but the plaintiff, but objected to the amount of the sum contained in the order, which they desired to have rectified. Another order was then sent to them, which *Douglas* again objected to, promising at the same time to pay the plaintiff what they really owed to *Delvallè*, and requesting an order to pay or give credit to the plaintiff, for so much in their hands as was in fact due to *Delvallè*. An order in this form was accordingly sent to them, which they accepted; in consequence of which the plaintiff advanced 70 l. to *Delvallè*; who afterwards becoming a bankrupt, the defendants refused to pay the money to the plaintiff according to the

A. being indebted to *B.* for brokerage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the sum due from *A.* to *B.* as a security, on which *C.* lends *B.* a farther sum; and the order is accepted by *A.* On the refusal of *A.* to comply with the order, *C.* may maintain an action for money had and received against him.

order.

1789. order. On which refusal this action was brought. The declaration contained four counts. 1. Money had and received. 2. Money paid, &c. 3. Money lent, &c. 4. An account stated. Verdict for the plaintiff; which on a former day *Lawrence*, Serjt. contended, was not supported by evidence under the form of action which the plaintiff had chosen, and therefore obtained a rule to shew cause, why it should not be set aside, and a new trial granted.

ISRAEL
v.
DOUGLAS.

On this day Mr. Justice HEATH, who tried the cause, stated the evidence, to the same effect as above, and cited the case of *Fenner v. Mears*, Hil. 19 Geo. 3. C. B. 2 Blac. 1269.

Adair, Serjt. shewed cause, arguing, that as substantial justice had been done, the Court would not set aside the verdict, and favour an objection drawn from the strictness *summi juris*. The case of *Fenner v. Mears* must decide the present; there is no difference between them, except that in one, the money was secured by bond, in the other it was a book debt. That was an action for money had and received. But clearly the verdict may be supported on the count on the *insimul computassent*. The evidence proved, that the defendants agreed to pay the balance of the account to the plaintiff, the only doubt was as to the *quantum* of the sum. They were indebted to *Delvallè*, and promised to pay their debt to *Israel*. This promise was made on a good consideration.

(HEATH, J. here mentioned the case of *Moulfdale v. Birchall*, 2 Blac. 820. and observed that the question there was, Whether an uncertain *chose in action* could be assigned? not, Whether the consideration was a good one?)

But whatever might be the effect of the assignment of *Delvallè's* debt to *Israel*, yet the defendants had made themselves liable by an express promise, in consideration of money advanced by *Israel*. The case therefore stood clear of the original effect of an assignment of a *chose in action*. They undertook to pay the amount of unliquidated damages; they consent to account with the plaintiff instead of *Delvallè*; the count therefore on the *insimul computassent*, was strictly supported by evidence.

There was also evidence of money paid to the use of the defendants. *Israel* actually advanced money to *Delvallè*, for which the debt owing by the defendants was assigned to him: they were therefore discharged, as far as *Delvallè* was concerned.

Lawrence, Serjt. on behalf of the defendants contended, that as the original debt to *Delvallè* was for brokerage, he ought to

have brought the action, for work and labour, and not for money had and received. If so, *Israel* could not maintain any action, which *Delvallè* himself could not. In the case of *Fenner v. Mears*, Cox had actually paid money to *Mears*, there was therefore good evidence of money had and received by him. Here there was no money paid by the original parties; the contract between them was for work and labour: if *Delvallè* had ever paid money to the defendants, it would be a different case. As to the count on the *infirmul computassent*, the form of that count is "that the defendants accounted with the plaintiff of money before that time due and owing from them to the plaintiff;" but in this case, there was no money due and owing from them to the plaintiff; it was owing to another person, namely, to *Delvallè*. As to any objection which may be made, on account of *Delvallè* having become a bankrupt, to his bringing the action; the case of *Winch v. Keeley*, 1 Term Rep. B. R. 619. is an authority to shew, that he might have brought it, and if the bankruptcy had been pleaded, he might have replied, that before the bankruptcy the debt was assigned, and that he brought the action, on behalf of the assignee.

Lord LOUGHBOROUGH.—The point made at the trial was, that the plaintiff had mis-conceived his action. Now where a party has not the substantial justice of the case on his side, the court will not favour any action which he may bring. But where justice is clearly with him, they will, if possible, allow him to maintain the action he has brought; because the only effect of a refusal would be to make him adopt another form of action. In the present case, it is admitted that the plaintiff has the law with him in *some* action. But it has been argued, that *Delvallè* ought to have brought the action. Yet I cannot conceive why that should prevent the plaintiff from having his remedy. It was also said, that *Delvallè's* action should have been for work and labour. But to admit this, we must strain a point, and suppose that *Delvallè* had really performed work and labour for the defendants. For in general, the demand which a broker has upon his employer, is for the difference of money on account between them for premiums, &c.; so that if he were to rest solely on a count in his declaration for work and labour, without the common money counts, he would be in danger of a nonsuit. It was further contended, that the money was in point of fact owing by the defendants to *Delvallè*, that their undertaking was to him, that in reality no money was had or

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received

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1789. received by them to the use of the plaintiff. But *Delvallè* had paid for premiums on account of the defendants, which created a debt from them, and which he might have set off against any similar demands of theirs against him. This debt is, with the consent of the parties, assigned to the plaintiff. *Douglas* has due notice of it, and assents; by which assent he becomes with his partner, liable to the plaintiff. He makes no objection to an order from *Delvallè* to pay his money to the plaintiff, but only to the amount of the sum to be paid. He insists that the whole demanded by *Delvallè* was not due, and therefore requires a looser order, on the faith that he would pay the balance: on his failure to pay, his promise attached, so as to make the defendants liable to an action.

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Then the question is, Whether when *Israel* brings an action in his own name against the defendants, this shall not be considered as money had and received by them to his use? Now when *Douglas* had admitted the money to be due, he was that moment estopped, as it were, from saying that it was not due. I also think the action might be maintained on the account stated. *Delvallè* gives an order to pay to the plaintiff a liquidated balance; the only dispute is concerning the amount of that balance. *Douglas* says "I will pay you according to the sum which shall appear to be due." He is here again estopped from denying the effect of his promise. I am therefore of opinion, that the verdict is right, and ought not to be set aside.

GOULD, J.—This case is like that of a man having money due to me in his hands, which I order him to pay to another. Now if I pay money to you for another person, it is money had and received by you to his use. But where is the real and substantial difference, whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money, to which you expressly assent? In reason and sound law, it is money had and received to the use of such third person. If my debtor tenders me money, which I give back to him and tell him to pay to another, he then in point of fact receives money to the use of the other. But is there any real difference between such a case and the present? As to the account stated, I think that count also, all the circumstances considered, comes within the fair compass of the case; but I have not the least doubt as to the count for money had and received.

HEATH, J.—I think in mercantile transactions of this sort, such an undertaking may be construed to make a man liable for money had and received.

WILSON,

WILSON, J.—It is highly necessary that the forms of actions should be kept distinct. Courts of justice have, in my opinion, already gone quite far enough, in extending the favourite count, for money had and received. But I know of no case, where they have gone so far as to allow that count to be maintained, where no money has in fact been received by the defendant. Here it by no means appears that money was had or received by the defendants. I am also of opinion that this demand between the parties, being for brokerage, was, from the nature of it, the subject of an action for work and labour. Now though it be true, that where a man is my debtor, he holds my money, yet I cannot accede to this as a general proposition, that whenever a man is my debtor, I am entitled to bring an action against him for money had and received. A taylor might, according to this rule, bring an action for money had and received against a man, who had not paid him for a suit of cloaths. For my idea is, that where no money has been actually had and received, no action for money had and received can be supported. In the case of *Fenner v. Mears*, money was in fact received by the defendant; there the action might clearly be maintained. So here it would have been proper, if it could be shown, that money was received by *Douglas* to the use of *Detwalle*.

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I thought it necessary to say thus much, because my brother *Gould*, whose opinion I very highly respect, and whose very *dictum* would at all times, make me doubtful of my own judgment, has expressed his sentiments decidedly in favour of this count for money had and received. I do not indeed mean to say positively that the action will not lie, particularly as I agree in opinion with the rest of the court, as to the count on the *infinis computassent*; but I very much doubt the position, which has been so strongly laid down, that the acknowledgement of the defendant *Douglas*, of the money being due to *Detwalle* was evidence of money actually had and received by him; for I am not inclined to favour an implication which is contrary to fact.

Rule discharged.

THE END OF EASTER TERM.

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C A S E S

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Trinity Term,

In the Twenty-ninth Year of the Reign of GEORGE III.

Saturday,
June 13th.

COLLINS and another v. MORGAN and another.

Where in an action against officers of the excise for seizing goods they do not tender amends before action brought, but pay money into court, and afterwards gain a verdict (the jury finding that the sum paid in was sufficient) they are entitled only to single costs, under the stat. 23 Geo. 3. c. 70. s. 31. Qu: Whether they are entitled to treble costs under the 34th section of that statute, if they tender amends?

IN *Michaelmas* term last an action of trespass was brought against the defendants as officers of the excise, for seizing a quantity of tea and other goods not exciseable, of the plaintiff; previous to which, a month's notice had been given them pursuant to the statute 23 Geo. 3. c. 70. s. 30. They made no tender of amends before the action was brought, but pleaded the general issue, and paid 16*l.* into court, as allowed by the 33d section of the statute. Mr. Baron *Perry*, who tried the cause at the last assizes at *Reading*, left it to the jury to consider whether this sum was sufficient for the damages of the plaintiff, and if so, they should find a verdict for the defendants; which they accordingly did.

On taxing costs, the prothonotary allowed treble costs to the defendants, but did not sign the *allocatur*, leaving it to the plaintiffs to apply to the court if they thought proper, for a rule on him to review his taxation.

A rule was accordingly granted in the last term to shew cause why the taxation should not be reviewed by one of the prothonotaries, and why the costs should not be considered and taxed as single instead of treble.

Against this rule *Runnington* Serjt. now shewed cause; he contended that by the 34th section of the stat. 23 Geo. 3. c. 70. the

the defendants were entitled to treble costs. The only doubt was on the 33d section, but that was explained by the 34th.

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Cockell Serjt. for the plaintiff argued, that by the 33d section, where the defendants had neglected to tender amends before action brought, they were enabled to pay money into court at any time before issue joined, whereupon such proceedings, orders and judgments should be had and made, in and by such court, as in other actions where the defendant is allowed to pay money into court. Here the defendants had not tendered amends before action brought. They were therefore to be considered as any other defendants who had paid money into court, and the remedy was not to be enlarged beyond the case.

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The court said, that it seemed, on the true construction of the statute, that where the excise officers were originally in the wrong, (as was admitted here by paying money into court,) unless they tendered amends in time, namely, before action brought, they were not entitled to treble costs; and as there was no tender of amends in this case they ought not to have more than single costs.

But the court also said, that though at all events the officers of the excise had no right to treble costs under this statute without having tendered amends, yet whether the tender of amends could give them that right was a question not involved in the present decision, and which it would be time enough to determine when it actually arose.

Rule absolute without costs.

HOBSON and another *v.* CAMPBELL.

Saturday
June 13th.

ON a motion of *Rooke* Serjt. a rule was granted in the last term to shew cause why a common appearance should not be entered for the defendant and the bail bond given up to be cancelled. The ground of the motion was, the insufficiency of the affidavit to hold to bail; which stated,

A bond was given conditioned for the payment of bills of exchange drawn in England, on A in the East Indies, in case such bills should be returned

That "*Alexander Campbell was indebted unto the deponent (Hobson,) and to Andrew French, in the sum of 17,600 l. and upwards, for principal and interest upon three several bonds*

to England, protested for non-payment. The affidavit to hold the obligor to bail, after stating "that he was indebted to the deponent in a certain sum," stated also the condition of the bond, and "that the said bills were not paid to his knowledge or belief, in India or elsewhere, but that they were protested for non-acceptance in India, and were still unpaid." It was no objection to this affidavit that it was stated that the bills were unpaid to the knowledge or belief of the plaintiff. But it was bad, because it introduced a new term not mentioned in the condition of the bond. But to remedy this, the plaintiff might have filed a supplemental affidavit.

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“ or writings obligatory, under the respective hands and seals
 “ of Sir *James Cockburn*, bart. *Henry Douglas*, Esq; *Lauchlan*
 “ *Maclelan*, and the said *Alexander Campbell*; the first of which
 “ said bonds bears date the 17th day of *July* 1776, and in the
 “ penal sum of 12,104 *l.* the second, the 23d of *September* 1776,
 “ in the penal sum of 6104 *l.* and the third, the 23d of
 “ *September* 1776, in the penal sum of 6000 *l.*

“ That at the foot of the said bond dated the 17th of *July*
 “ 1776, is the following condition, or to the effect thereof:

“ Whereas the above bounden Sir *James Cockburn* hath de-
 “ livered to the above named *Andrew French* and *Daniel Hobson*,
 “ for value received, a certain set of bills of exchange, four in
 “ the set, bearing even date herewith, drawn by the said Sir
 “ *James Cockburn*, on Lieutenant Colonel *Cockburn*, in *Bombay*,
 “ in the *East Indies*, for 12,104 *l.* and one-third *Star Pagodas*,
 “ payable at 60 days *sight*, to the order of the said *Douglas* and
 “ *Cockburn*, and by them indorsed, as also by the said *Lauchlan*
 “ *Maclelan*, *Alexander Campbell*, a true copy of which said set of
 “ bills of exchange is hereunder written.

“ The condition of the above written obligation is such, that
 “ if the said set of bills of exchange, or any of them, shall be *duly*
 “ *paid* at *Bombay* aforesaid, according to the true meaning there-
 “ of, or if the said set of bills of exchange or any of them shall be
 “ returned and come back to *England*, *duly protested for want of*
 “ *payment*, (no one of them having been acquitted as aforesaid,)
 “ and the said Sir *James Cockburn*, *Henry Douglas*, *Lauchlan*
 “ *Maclelan*, and *Alexander Campbell*, any or either of them, their
 “ or either of their heirs, executors, or administrators, shall and
 “ do well and truly pay or cause to be paid unto the said *An-*
 “ *drew French*, and *Daniel Hobson*, their executors, administra-
 “ tors, or assigns, within 30 days next after any of the said set
 “ of bills of exchange returned with *protest duly made for want*
 “ *of payment* thereof, (no one of them having been acquitted as
 “ aforesaid,) shall be produced, or legal notice thereof given to
 “ the said Sir *James Cockburn*, *Henry Douglas*, *Lauchlan Mac-*
 “ *lean*, and *Alexander Campbell*, or any of them, their, any or
 “ either of their heirs, executors, or administrators, the full
 “ amount of such bills of exchange as shall be so returned,
 “ and after the rate of 10 *s.* sterling *per Pagoda*; then the
 “ above written obligation to be void, else to be and remain in
 “ full force and virtue.”

The

The conditions annexed to the other bonds were, to the same effect. 1789.

The deponent then proceeded to state,

“ That none of the said bills of exchange were to his knowledge or belief paid, either at Fort St. George, Bombay, or else, where in India, in the conditions of the said respective bonds named, but that such bills were respectively protested in India for non-acceptance, and that the same are now unpaid, &c.”

In the last term *Adair, Le Blanc, and Lawrence*, Serjts. shewed cause, contending that on the face of the affidavit which was sufficiently certain, there was no ground for the application. The deponent swears positively in the beginning of the affidavit, that the defendant is indebted to him and the other plaintiff in a sum certain, on three bonds which made the cause of action. This is a substantive independent sentence, and if it stood by itself would be clearly sufficient. The affidavit then goes on to state how the cause of action arose; but as this was not necessary, it was surplusage, and surplusage shall not vitiate,

This case differs from that of the cause of action being insufficiently stated, as in the case of *Mackenzie v. Mackenzie* (a). Where the cause of action is a bond, it is not necessary to look to the condition, in making an affidavit to hold to bail. If it were a single bond, it must necessarily be sufficient to hold to bail. The condition can only be taken advantage of by *oyer* and pleading. The plaintiff was not obliged to set it out. But it even appears from the condition as stated, that the bonds were given for value received. The defendant also, by the practice of this court might have filed a cross affidavit, and shewn the insufficiency of that made by the plaintiff. The only doubt which can be reasonably entertained, as to the positiveness of this affidavit, is that it states, that none of the bills of exchange were paid to the “knowledge or belief” of the plaintiff. But on many occasions, the belief of the party is sufficient. 4 Burr. 1992.

Then the material question is, Whether non-acceptance be not equivalent to non-payment, so at least as to give the plaintiff a right to recover? But it has been decided in the King’s Bench, (b) that non-acceptance gives a right of action against the drawer of a bill without waiting for the day of payment.

Rooke and Bond, Serjt. *contra*. An affidavit to hold to bail is insufficient, if it be conceived in terms of reference. 2 Stra. 1157.—1 Term Rep. B. R. 716. Here the conditions of the several bonds were referred to, and yet the deponent does not afterwards shew that those conditions were not complied with.

(a) 1 Term Rep. B. R. 218.

(b) Dougl. 55. last edition. Buller’s N. P. 269.

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BELL.

By the conditions, the bills were to be returned protested for non-payment, but the affidavit states only that they were protested in *India* for non-acceptance, and are now unpaid; and this but on the knowledge or belief of the plaintiff. But in 2 *Stra.* 1226 "belief" was holden not sufficient. In transactions of this kind in *India*, where bills are drawn payable a great length of time after sight, effects are frequently sent to the hands of the drawee, during that time. The bonds were therefore designed to guard against the non-payment of the bills, and not merely their non-acceptance. The conditions accordingly were that they should be returned protested for non-payment. There are no merits therefore disclosed on the affidavits. Neither is there at the conclusion a positive allegation of a debt being owing. It is stated that to the knowledge or belief of the deponent the bills were not paid: but this might be true, and still no debt arise, as the laches of the holder might discharge the drawee, after a certain period. Though the former part of the affidavit were sufficiently positive, if it were unconnected with the latter; yet by being so connected, it becomes uncertain and defective. A general affidavit of debt, referring to special causes of the debt, which are insufficient, is vitiated by such reference. So where man says to another "you are a thief," for you have stolen such a (a) thing, the stealing of which is not a felony; the words are not actionable, because the reason is given for calling the person a thief, but which is not sufficient to support the allegation. The act of parliament which requires the cause of action to be explicitly stated, was made for the protection of the liberty of the subject, and is strictly to be observed.

Cur. vult. advis.

On a subsequent day in the last term, Lord LOUGHBOROUGH said, that the court felt no difficulty in declaring their opinion on one part of the case, namely, that the affidavit was sufficiently positive as far as it stated, the knowledge or belief of the deponent that the bills were unpaid; there being authorities enough to prove that a more positive statement was not required, where from the nature of the question, the party could only have a ground of belief, and could not make a direct assertion. But here the conditions of the bonds being set out, it appeared that the affidavit introduced another term into them, namely, that of the bills being returned protested for non-acceptance, which was material, and rendered the affidavit bad. But his Lordship said,

(a) *Co. Jac.* 214. *Buller's N. P.* 5.

that

that the plaintiffs might be permitted to file a supplemental affidavit, if they chose it, according to the practice of this court.

(On this day, the counsel for the defendant stated, that the plaintiffs had been apprized of the opinion of the court, delivered as above, but that they had no intention to file a supplemental affidavit. Therefore

The rule was made absolute (a).

(a) [See the merit of this case; post, vol. 2. p. 163: 6 Term Rep. B. R. 200. *French & al. v. Campbell.*]

McQUILLIN v. COX.

Friday,
June 19th.

THIS was an action of debt on simple contract. The declaration after reciting that the defendant was summoned to answer the plaintiff in a plea that he *render to him 500 l. &c.*, contained five counts. 1st. That the defendant was indebted to the plaintiff in 100 l. for goods sold and delivered. 2d. 100 l. on a *quantum meruit*. 3d. 100 l. on a *mutuatus*. 4th. 50 l. for money had and received. 5th. 100 l. on an account stated. Each count ended in the usual form, with stating, "that an action had accrued, to demand and have the said last-mentioned sum of money, "*part and parcel of the said sum of 500 l. above demanded.*" The breach was assigned in the following words, "yet the said *James*, (although often requested, &c.) hath not as yet rendered the said sum of 500 l. *above demanded*, or any part thereof to the said *John*, but to render the same or any part thereof to the said *John*, hath hitherto wholly refused, &c." damages 20 l.

In an action of debt on simple contract, the declaration is good though it specify by the several counts a *less* sum than appears to be demanded by the recital of the writ, and yet assigns as a breach the non-payment of the sum demanded in the writ. In such an action the plaintiff may prove and recover a *less* sum than is stated to be due.

Special demurrer, "for that the said *John* by his declaration bath demanded of the said *James*, to render to him the said *John*, 500 l. and yet the several sums of money, claimed to be due and owing to the said *John*, by the said *James*, upon the several counts of the said declaration, do not amount in the whole to 500 l. *so demanded* by the said declaration, but *only to the sum of 450 l.*, and for that it does not appear, from or by the said declaration, that the said *John* hath any pretence or ground in law, whereby to demand the said sum of 500 l. &c."

Bond, Serjt. in support of the demurrer. The action of debt was originally brought on simple contracts, but gradually gave way to *assumpsit*, partly because the defendant might wage his law, and partly because it was necessary that the specific sum demanded should be recovered. But the nature of the action remains the same, and the plaintiff must state in his count the same

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v.
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same sum as was demanded by the writ, or shew some act done by which the whole is not due as demanded. In the present case there appeared on the face of the declaration to be 50*l.* short of the original demand, and which was unaccounted for. Even supposing that the plaintiff may recover a verdict for a less sum than he demands, yet this question arises on a special demurrer, on account of the declaration being contrary to the rules of law, and is not affected by the sum which a jury may give in a subsequent stage of the proceedings. *Moore*, 298. *Smith v. Vowe*.—*Yelv.* 5. *Crompton v. Smith*.—2 *Lev.* 4.

Marshall, Serjt. on behalf of the plaintiff, contended that the only grounds of the demurrer must be, either a mis-recital of the writ, or a variance between the writ and the declaration.

If it be taken to be a mis-recital it does not vitiate, because upon *oyer* the writ would appear to support the declaration, 2 *Salk.* 701. But it has been holden that the recital is unnecessary, 2 *Keb.* 544. It has been also holden that the recital of a writ cannot be argued from, but the writ itself must be brought before the court upon *oyer*. 1 *Str.* 225. This court held in a late case on special demurrer, that a mis-recital by stating the defendant to have been attached instead of summoned, did not vitiate the declaration. *Barnard v. Moss*, C. B. Hil. 1788. In which case that of *Warren v. Ward* was cited, C. B. Tr. 1787. where this court held, that as the recital of the writ was unnecessary, no objection could be made to a mis-recital of it.

But if this should be considered as a variance, and not a mis-recital, yet it is such a variance as is not material. The amount of the sums specified by the different counts ought certainly not to exceed the sum demanded in the writ: because the original writ issuing out of Chancery is the ground and foundation of the proceedings of that court into which it is returnable; and such proceedings ought to be conformable to the authority given; at least the authority ought not to be exceeded.

But no such objection can be made against declaring for less than the writ demands. *Comb.* 260.—*Litt.* f. 67.—*Co. Litt.* 55. b.—*Moore*, 862.—*Hob.* 38. If the several sums mentioned in the declaration amount to more than the sum in the writ, it is a matter of abatement. In the case of *Crompton v. Smith*, *Yelv.* 5. more was demanded in the declaration than was warranted by the writ; but that case shews that where less is demanded the court may give judgment for that sum. Another distinction which the courts have adopted is, that when the action is grounded

grounded on a record, specialty or statute, giving a sum certain as a penalty, the precise sum must be set forth in the count conformable to the writ, because there ought not to be a variance from the record, specialty or statute, on which the action is brought. 3 *Mod.* 41. But where the action is founded on a contract, or a statute which gives no certain penalty, a variance is not material, because the plaintiff does not recover according to his demand, but according to the verdict of the jury. *Cro. Jac.* 118. 498. 629. But supposing this to be a material variance between the writ and declaration, it cannot be taken advantage of without *oyer*; and after *oyer*, it must be pleaded in abatement. As the court will not decide upon the recital of the writ, the declaration must be taken to be good on the face of it. The demurrer is meant as a bar to the action. But as this variance, supposing it to be one, can at most only abate the writ, it cannot be a bar to the action, and therefore is not a ground of demurrer. *Com. Dig. Tit. Abatement, (G 8.)*

Bond in reply, allowed the authority of *Barnard v. Moss*, and that no objection was to be made on account of a mis-recital of the writ; but urged that in the present case there was a demand of 500 *l.* in the body of the declaration, and only 450 *l.* specified to be due. Each count mentioned the "residue of the 500 *l.* above demanded," and the breach stated that the defendant "had not rendered the said sum of 500 *l.* above demanded." The cases cited from *Moore* and *Hobart* only shew that in an action of waste the count may contain less than the writ, but do not affect an action of debt, in which the strictness of the antient rule ought to be preserved.

The court were clearly of opinion that the demurrer could not be maintained, because the plaintiff might in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

Judgment for the plaintiff.

GEHEGAN v. HARPER.

THE defendant being in the custody of the warden of the Fleet at the suit of the plaintiff, and an appearance being regularly entered, obtained a *superfedeas* on account of the plaintiff's not having declared in time. After this the plaintiff delivered a declaration against him as a prisoner, and on judgment

Saturday,
June 13th.
If a declaration be delivered against a prisoner as such, after he has obtained a *superfedeas*, it is irregular. But he cannot take advantage of the irregularity unless he apply to the court in due time.

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LIN
v.
Cox.

1789. ment by default, proceeded to execute a writ of enquiry. Upon which a rule was granted in the last term to shew cause why all proceedings subsequent to the writ of *superfedeas*, should not be set aside.

GRANHAM
v.
HARRIS.

Rooks, Serjt. in shewing cause against the rule, allowed that the proceedings were irregular, but contended that the defendant was not in this instance entitled to relief, as it appeared that he was superseded on the 12th of *April*, had notice of interlocutory judgment early in *May*, but did not make application to the court before the middle of that month. This delay was merely for the purpose of causing unnecessary expence to the plaintiff, and was a waiver of the advantage which might otherwise be taken of the irregularity. 1 *Barnes*, 162. 2 *Barnes*, 211.

Runnington, Serjt. in support of the rule said, that the defendant had applied to the court in due time; that the next step of which he was bound to take notice after the delivery of the declaration, was the writ of enquiry.

But the court said that the defendant could not take advantage of the irregularity unless he applied in due time: and here he had made an unnecessary delay.

Rule discharged.

GOULD, J. referred to the case of *Hutchins v. Kenrick*. 2 *Burr*. 1048.

Saturday,
Jan 15th.

Where there is judgment by default in an action on a promissory note, the court will refer it to the prothonotary to ascertain the damages and costs, and calculate interest without a writ of enquiry.

RASHLEIGH V. SALMON.

IN this action, which was on a promissory note, the defendant suffered judgment to go by default. In the last term, *Lawrence*, Serjt. moved for a rule to shew cause why it should not be referred to one of the prothonotaries to ascertain the damages and costs, and calculate interest on the note without a writ of enquiry. On behalf of the motion he cited *Bailey's Treatise* (a) 67, 2 *Saund.* 106. (b) *Dougl.* 315. 3 *Wils.* 61.

A rule to shew cause was accordingly granted, which on this day was made absolute, no cause being shewn (c).

(a) On the law of bills of exchange, cash bills, and promissory notes 1789. (b) Last Edition (c) [See *Andrew v. Biale*, post. p. 529. also adopted in *B. R.* See *Shepherd v. Longman & al. v. Fenn*, p. 541. *acc.* *Charter*, 4 *Term Rep. B. R.* 275. and *Derry v. Johnson*, 7 *Term Rep. B. R.* 473.] In the latter case the reasons of the practice are fully stated. The same proceeding is

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HAYS and another v. BRYANT.

Monday,
June 15th.

DEBT on bond dated *January 16, 1782*, in the penalty of 50 *l.* brought by the surviving churchwarden and overseer of the poor of the parish of *Ridgwell* in *Essex*.

Plea, after oyer of the bond and condition, which was to indemnify the churchwardens and overseers of the poor, and the inhabitants and parishioners of *Ridgwell*, against the charges which should arise or be imposed upon them, on account of the maintenance and bringing up of such child or children, as one *Elizabeth Winch* then went with, and should be delivered of;

Non est factum. 2. Non damnificati.

Replication, issue on the first plea. To the second, that *Elizabeth Winch* was delivered of two children, and that neither the defendant nor any person in his behalf provided any food or nourishment for them: by reason whereof the inhabitants, &c. of *Ridgwell*, lest the children should perish for want of necessary food and nourishment, were forced, and obliged to expend, and did necessarily expend 3 *l.* in providing, &c. and so were damnified, &c.

Rejoinder, That *no justice's order was ever made upon the inhabitants, &c. of Ridgwell, for the maintenance and bringing up of the said children, or for the payment or allowance of the money, &c. and so if they did expend, &c. it was of their own voluntary act and wrong, and if they were damnified, it was of their own act and wrong, &c.*

Sur-rejoinder, that they were damnified on account of the maintenance and bringing up of the said children, within the true intent and meaning of the condition of the bond, &c. and not by their own voluntary act and wrong: on which issue was joined.

It was proved at the trial, that the defendant had agreed to pay 2 *s.* 6 *d.* per week for the maintenance of the children, and in fact paid it up to *Michaelmas 1787*, and then refused to pay any further, alleging that the sum was too great. The counsel for the defendant objected, that the plaintiffs or parishioners were not obliged to maintain the children, without a justice's order for that purpose. But Mr. Justice *Wilson*, who tried the cause, overruled the objection, and a verdict was found for the plaintiffs.

A rule having been granted to shew cause why the verdict should not be set aside, and a nonsuit entered; *Bond*, Serjt. repeated

Where a bastard child is born in a parish, for whose sustenance the parents neglect to provide necessaries, the parish officers are obliged to do it, without an order of justices for that purpose.

1789. peated the objection which he made at the trial; and cited the case of *Simpson v. Johnson, Dougl. 7.*

HAYS *Cockell*, Serjt. was going to shew cause, but was stopped by
BYRANT. the court, who held clearly that an order of justices was not necessary to make the officers of the parish liable to do what they were otherwise under a legal obligation of doing, namely, to provide necessaries for the children, and therefore

Discharged the rule.

Monday,
June 22d.

BOONE V. EYER.

The plaintiff having added the *familiar* to the replication and delivered the issue to the defendant, who accepts it but does not pay the issue money, judgment may be signed by the plaintiff without giving a rule to rejoin.

THE plaintiff's attorney in this cause added the *familiar* to the end of his replications, and delivered the issue with notice of trial to the defendant's attorney, who received it but did not pay the issue money. In consequence of which the plaintiff's attorney signed judgment, without giving a rule to rejoin.

A rule was obtained to shew cause why the judgment and all the subsequent proceedings should not be set aside for irregularity, on the ground that a rule to rejoin ought to have been given.

Against which *Lawrence*, Serjt. shewed cause, contending that by the practice of the court the plaintiff was at liberty to sign judgment without giving a rule to rejoin, where the defendant had accepted the issue and not paid for it.

Runnington, Serjt. in support of the rule cited (a) *Impey's New Instructor Clericalis* of this court 292, to shew that a rule to rejoin was necessary. But

The court, (after consulting the prothonotary, who said that the practice was, not to give a rule to rejoin where the defendant had received the issue with the *familiar* added by the plaintiff, and not struck it out,)

Discharged the rule with costs.

(a) 2d Edition.

Tuesday,
June 23d.

ROUTLEDGE EXECUTRIX OF ROUTLEDGE V.

BURRELL, BART. and another.

A deed poll containing an insurance against fire, may refer to

THIS was an action of covenant on a policy of insurance against fire.

conditions in a printed paper, without stamp, seal, or signature; and it may be a part of those conditions that the insured shall procure a certificate of his character, and that the loss happened without fraud.

The

The first count of the declaration stated, That by a certain *deed poll* or policy of assurance made, &c. June 18th, 1776, between the testator and the defendants, (which said *deed poll* was casually burnt and destroyed by the fire thereafter mentioned,) reciting that the testator had paid a certain sum of money, &c. to the *Society of the Sun-fire Office in London*, and other particulars of the insurance, the defendants covenanted, &c. &c. that the stock and fund of the said Society should be subject and liable to pay to the said testator, &c. all such his damage and loss which he the said testator should suffer by fire, not exceeding the sum of 1000 l. according to the exact tenor of their printed proposals, dated July 6, 1775; and the plaintiff further said that the printed proposals in and by the said deed mentioned and alluded to, were in substance, and to the effect following, &c. Those proposals were then set out at length, the 10th article of which provided, that “persons insured sustaining any loss or damage by fire were to give notice thereof at the office, and as soon as possible afterwards, and deliver in as particular an account of their loss and damage as the nature of the case would admit of, and make proof of the same by their oath or affirmation according to the form practised in the said office, and by their books of accounts, or other proper vouchers as should reasonably be required; and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing that they were well acquainted with the character and circumstances of the person or persons insured, and did know or verily believe, that he, she, or they, really and by misfortune without any fraud or evil practice, had sustained by such fire, the loss and damage, as his, her or their loss, to the value therein mentioned; but till such affidavit and certificate of such the insured’s loss should be made and produced, the loss money should not be payable; and if there appeared any fraud, or false swearing, such sufferers should be excluded from all benefit by their policies; and in case any difference should arise between the office and the insured touching any loss or damage, such difference should be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing should be conclusive and binding to all parties; and when any loss or damage was settled and adjusted, the insured were to receive immediate satisfaction for the same, deducting only the usual allowance of 3 l. per cent.”

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It was then averred, that the testator was interested in the goods, &c. insured; that they were burnt without fraud, &c.; that the society had notice; that the testator delivered in as particular an account, &c. of his loss on affidavit; that he applied to the minister and churchwardens, and to many reputable inhabitants, &c. to procure a certificate, as in the said 10th article of the said proposals, was mentioned, according to the tenor and effect of the said proposals, &c.; that he was entitled to such certificate, &c. but that the defendants by false insinuations and promises of indemnity prevailed upon the minister, &c. to refuse to sign it; and that he was ready and willing to submit all matters in difference to arbitration, &c.

The 2d count was similar, but stated the printed proposals to have been destroyed by the fire, &c.

Plea. As to the supposed breach of covenant in the 1st count, &c. 1. That the testator had not any interest in the goods, &c. 2. Protesting that he was not intitled to a certificate, &c. the defendants did not prevail upon, or persuade the minister, &c. to refuse to sign or make such certificate, &c.: and as to the supposed breach in the second count, 1st, no interest, &c. 2dly, after stating at length the printed proposals, with the 10th article; "that neither the testator in his life-time, nor the plaintiff since his death procured such certificate, &c. as is mentioned" and required in that behalf, in and by the said 10th article of "the said last-mentioned printed proposals," &c.

Replication. Issue joined on the three first pleas, general demurrer to the last, and joinder in demurrer.

In support of the demurrer, *Marshall*, Serjt. argued in the following manner:

Before the grounds of the demurrer are stated, it will be proper to premise, that this being a deed poll to which the testator was not a party, it is competent to his executor to make exceptions to any condition or restriction attempted to be annexed to it, tending to narrow or lessen the protection which it was meant to afford against the calamity of fire.

A deed poll differs materially from an indenture. An indenture bars either party from excepting to any thing contained in it. Each is estopped from disputing the validity of any part. But it is otherwise of a deed poll, which is only of one part, and the sole deed of the grantor. The words are his, bind him only, and are to be taken most strongly against him, and in favour of the grantee. It is peculiarly necessary to give this con-

struotion to policies of insurance against fire, which are entered into without examination, and without any previous negotiation to settle and adjust the terms of them; and in which the Court will not favour any restriction, which does not appear on the face of the policy itself. The plaintiff may therefore make every fair exception to the plea which sets forth those restrictions, both as to the mode of introducing them into the contract, and the validity of them, supposing them properly introduced. The objections are two. 1. That a condition or restriction cannot be annexed to, and made part of a deed by words of mere reference to a printed paper, distinguished only by the date of the year in which it was printed, without any signature, seal, or stamp, to give it authenticity. 2. That the restriction in question, though properly annexed to the deed, is in itself bad.

It would be attended with mischievous consequences, if parties were permitted to introduce into contracts under seal, by words of uncertain reference, conditions or restrictions in nowise authenticated by signing or sealing. It is a strong proof against such a practice, that there is no authority in the books to warrant it. In them three methods only are pointed out, of annexing a condition to a grant. 1. It may be contained in the same deed. 2. It may be indorsed before sealing, on the same deed. 3. It may be contained in another deed executed on the same day. 1 *Roll. Abr.* 413, 414. But it cannot be on a subsequent day. Thus if a disseisor release his right, and the disseisor at a subsequent day grant that the release shall be upon such a condition, the condition is void: but it may well be created at the same time as the release, although it be by another deed. 2 *Saund.* 48. Neither can it be made before the grant. 1 *Roll. Abr.* 413. If by words of reference, a mere printed paper may be made part of a deed, the revenue would be defrauded of the stamp duties. The same stamp might be used for several deeds. Leases might be drawn on one stamp, referring to a printed form, for the usual covenants.

2. If the condition of an obligation, recognizance, &c. be impossible, repugnant, or contrary to law, it does not vitiate the whole instrument, which remains single and freed from the condition. *Co. Litt.* 206.—1 *Roll. Abr.* 420.—3 *Lev.* 74. So if the condition be void for its uncertainty. Now the 10th article of the printed proposals, requires that the oath of the loss, &c. shall be “according to the form practised in the office.” But as the practice of the office is always at the discretion of those

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who conduct it, this clause puts it in their power to impose such an oath as no honest or conscientious man could take. The next clause, which requires "a certificate from the minister and churchwardens together with some other reputable inhabitants of the parish," &c. is equally objectionable. If a fire were to happen in an extra-parochial place, it would be impossible to comply with his condition. It might also be impossible for a stranger, lately come into a parish, to procure a certificate of his good character, from persons to whom he is unknown. But supposing him to be of such a character that no one will certify for him, yet he may not even be suspected of setting fire to his house; and then it ought not to be endured, that the directors of the Insurance Office should evade their contract made for a valuable consideration, under pretence, that the sufferer is an immoral person.

Lawrence, Serjt. on the part of the defendant, after saying that the point was clearly decided by the many actions brought against the Sun-fire Office, in which it was necessary to comply with the terms of the printed proposals, was stopped by

The court, who said, the matter was too clear to admit of a doubt, and accordingly gave

Judgment for the defendants (a).

(a) [See *Wood v. Worlesey*, post. vol. 2. p. 574. and 6 *Tern. Rep. B. R.* 710. and the note there.]

FITZHERBERT v. SHAW.

Saturday,
 June 27th.

The purchaser of lands, &c. having brought an ejectment against the tenant from year to year, the parties enter into an agreement that judgment shall be signed for the plaintiff, with a stay of execution till a given period.

The tenant cannot in the interval remove buildings, &c. from the premises, which he had himself erected during his term, and before the action was brought.

THIS was an action on the case in the nature of waste, tried before Mr. Justice *Gould* at the last *Surrey* assizes, in which a verdict was found for the plaintiff; the following circumstances of which appeared from the report of the judge:

From the year 1765 the defendant was tenant from year to year of the premises in question, which in 1787 were purchased by the plaintiff, who soon after, having given notice to quit, brought an ejectment against him to obtain possession. In *March* 1788 the parties entered into an agreement, among other things that judgment should be signed for the plaintiff in the ejectment with a stay of execution till the *Michaelmas* following, till which time the defendant was to continue in possession. In this agreement, no mention was made of any buildings, or fixtures.

Between

Between the time of entering into the agreement and the ensuing *Michaelmas*, the defendant took away several things from the premises, among which were, a wooden stable which stood on blocks or rollers, which he had before removed from an estate of his own adjoining to the premises in question, a shed which he had himself built on brick-work, and some posts and rails which he had also erected. For this, the action was brought. The declaration was in the usual form, and the plea, the general issue.

Mr. Justice GOULD was of opinion at the trial, that the defendant would clearly have been entitled to take away the above-mentioned articles, if he had done it, during the continuance of his term from year to year, but that by the agreement the parties had made a new contract, which put an end to the term. According to this opinion, the jury found for the plaintiff.

In the last term a rule was granted to shew cause why the verdict should not be set aside, and a new trial granted.

On this day *Bond*, Serjt. in support of the rule contended that the defendant had a right to take away the buildings and things which he had himself erected on the premises, the strictness of the antient rule which allows nothing annexed to the freehold to be removed, being relaxed by modern decisions. 1 *Atk.* 477. *ex parte Quincy*.—3 *Atk.* 13. *Lawton v. Lawton*, and (a) *Lawton*

(a) *LAWTON* Executor of *LAWTON* v. *SALMON*, *East.* 22 *Geo.* 3. *B. R.*

In this action of trover, brought by the executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt works, called *Salt-pans*, a case was reserved by consent, which stated,

That the testator, some years before his death, placed the salt pans in the works: that they were made of hammered iron and rivetted together; that they were brought in pieces and might be again removed in pieces; that they were not joined to the walls, but were fixed with mortar to a brick floor; that there were furnaces under them; that there was a space for the workmen to go round them; that there were no rooms over them; but that there were lodgings at the end of the wych-houses; that they might be removed without injuring the buildings, though the salt works would be of no value without them, which with them were let for 8 *l.* per week.

The question was, Whether the executor or the heir at law were entitled to them?

Mingay, for the plaintiff, said it was stated in the case that the pans were not affixed to the freehold, but might be removed, they ought therefore clearly to go to the executor. He cited *Lawton v. Lawton*, 3 *Atk.* 13. and the case of the cyder-mill there mentioned.

Dawson, for the defendant, argued that the salt-pans were so annexed to the freehold as to pass to the heir at law, both in respect to the strict rule of law, and the nature of the property itself; although they were not fixed to the wall, yet they were to the floor, which is part of the freehold. *Co. Litt.* 53. a. 4 Co. 62. *Herlakenden's case*, *Moore* 177. *Owen*, 70. 2 *Vern.* 508. (b) As to the cases relied on *ex contra*, in that of *Lawton v. Lawton*, 3 *Atk.* the question was between a tenant for life and a remainder-man, and the distinction between such parties and the heir and executor is recognised by Lord *Hardwicke* in 1 *Atk.* 477. Besides, a fire-engine is merely an accessory, and not a

(b) See also 1 *P. Wms.* 24 *Buck v. Ribson*.

S 2

principal

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1789. *ton v. Salmon, B. R. East. 22 Geo. 3.* He also said that, under the circumstances of this case, there was an implied contract between the parties, to continue the tenancy from year to year,

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principal in a colliery, but the wych-houses are of no value without the salt-pans. If they were taken away, the houses would go useless to the heir, and the executor gain nothing but old iron. On the principles of trade the public convenience which operated with Lord Hardwicke in *Lawton v. Lawton*, the defendant is entitled. The case of the cyder-mill is not reported, and was only a *nisi prius* determination of *Comyns*, who in 1 *Dig.* 594. lays it down that mill-stones go to the heir. It was the opinion of Mr. *Wilbraham*, soon after the case of the fire-engine was decided, that the heir was intitled to fixtures of this kind, and his opinion has ever since been acquiesced in. Though the pans may be removed, yet from their nature, and on the rule, that the principal shall not be destroyed by removing the accessory, they ought to remain to the heir. This is not a contest between a tenant for years or life and the remainder-man, but between the different representatives of the same person.

Cur. vult advis.

On a subsequent day Lord *Mansfield*, after stating the case, said,

All the old cases, some of which are in the year books, and *Brooke's Abridgment*, agree, that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases, for the benefit of trade, between landlord and tenant, that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited. There has been also a relaxation in another species of cases between tenant for life and remainder-man; if the former has been at any expence for the benefit of the estate, as by erecting a fire-engine, or any thing else by which it may be improved; in such a case it has been determined that the fire-engine should go to the executor, on a principle of public convenience being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of tenant for life and remainder-man as that of landlord and tenant, namely, that the remainder-man is not injured, but takes the estate in the same condition as if the thing in question had never been raised.

But I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cyder-mills, which is not printed at large. The present case is very strong. The salt-spring is a valuable inheritance, but no profit arises from it, unless there is a salt-work; which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expence of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing therefore and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expence of erecting these salt-works; he might very well have said, "I leave the estate no worse than I found it." That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. Mr. *Wilbraham* in his opinion takes the distinction between executor and tenant. For these reasons we are all of opinion that the salt-pans must go to the heir.

Passes to the defendant.

and

and if so, all the rights which the defendant had under that tenancy, must continue. *Beavan v. Delahay, ante, 5.* 1789.

Adair, Serjt. was going to shew cause against the rule, but was stopped by the court, who said, it was not necessary to go into the general question, as to the right of a tenant to remove buildings, &c. since the fair interpretation of the agreement was, that as the defendant was to remain in possession, for a certain time after that agreement was entered into, and judgment signed in the ejectment, he should do no act in the mean-time to alter the premises; but should deliver them up, in the same situation, as they were in, when the agreement was made, and the judgment signed.

Rule discharged.

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JOHNSTONE Executor of JOHNSTONE v. MARGETSON.

Monday,
June 29th.

THIS was an action brought by the executor of the late commodore *Johnstone*, against the Prize Agent, to recover 914*l.* being one-eighth part of the money arising from the sale of a *Spanish* ship, under the King's proclamation dated the 25th of *June* 1779, for granting the distribution of prizes during the then hostilities with *Spain*.

The declaration was for money had and received with the usual counts.

The cause was tried at the sittings after *Hilary* term 1788, before Lord *Loughborough*, when a verdict was found for the plaintiff, subject to the opinion of the court on the following case:

On the 16th of *December* 1780, the deceased being then at *Spithead*, and a flag-officer and commodore on the *Lisbon* station, wrote an order to Capt. *Mann*, who was then commander of the *Cerberus* frigate, one of the Squadron under the command of the deceased on the said station, to sail on a cruise: which order was received by Capt. *Mann*, at *Lisbon*, on the 17th of *January* 1781, who in consequence of it sailed on the 28th of *January* 1781, and on the 25th of *February* 1781, took as prize the *Grana*, a *Spanish* frigate.

On the 3d of *March* 1781, Captain *Mann* arrived at *Plymouth* with the prize, and wrote to the deceased then at *Spithead*, informing him of his arrival.

During the late war a flag-officer on a certain station gave orders to a ship under his command to sail on a cruise; after the order were given, but before a prize was taken, he accepted another command; but no other flag-officer was appointed to succeed him on his former station. He was not intitled to one-eighth of a prize taken by the ship which sailed in consequence of his orders, under the proclamation for the distribution of prizes.

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On the 19th of *January* 1781, a commission had been made out from the Admiralty, appointing the deceased to *another command* with certain other ships, among which the *Cerberus* was not included; which commission he received on the 3d of *February* 1781.

After the 19th of *January* 1781, no orders were addressed by the Admiralty to the deceased as commander on the *Lisbon* station, nor was any other flag-officer appointed to that station.

This was argued in *Trinity* term 1788, by *Adair*, Serjt. for the plaintiff, and *Lawrence*, Serjt. for the defendant: and a second time in *Easter* term last, by *Le Blanc*, Serjt. for the plaintiff, and *Bond*, Serjt. for the defendant. On the part of the plaintiff it was contended in substance as follows:

The first clause of the proclamation material to the present question, is that which directs, that after the produce of any prize shall be divided into eight equal parts, "The captain and captains of any of our said ships and vessels of war, who shall be *actually on board* at the taking of any prize, shall have *three eighth parts*; but in case any such prize shall be taken by any of our ships or vessels of war under the command of a flag or flags, the flag-officer or officers, being *actually on board*, or directing and assisting in the capture, shall have one of the said *three-eighth parts*, the said one-eighth part to be paid to such flag or flag-officers in such proportions, and subject to such regulations as are herein after mentioned."

Under this clause, the deceased commodore, was intitled to one-eighth of the prize in dispute, since the giving orders is a direction and assistance. Having given the order, he was intitled to all the beneficial consequences of it. His personal presence was not necessary. Captains by this clause must be *actually on board* at the time of the capture, otherwise they have no right to share in the prize; but the direction as to flag-officers is in the disjunctive; they must be either on board, or assisting and directing, and the only way of assisting and directing where the flag officer is not on board, is by giving orders.

The next clause to be considered is that which is in the following terms: "We do hereby will and direct, that the following regulations shall be observed concerning the one-eighth part herein before mentioned to be granted to the flag, or flag-officers who shall *actually be on board* at the taking of any prize, or shall be directing or assisting therein; first, that a flag-officer commander in chief, when there is but one flag-officer

“ officer upon service, shall have to his own use the said one-eighth part of the prizes taken by ships and vessels under his command : Secondly, That a flag-officer sent to command at *Jamaica*, or elsewhere, shall have no right to any share of prizes taken by ships or vessels employed there, before he arrives at the place to which he is sent, and has actually taken upon him the command : Thirdly, That when an inferior flag-officer, is sent out to reinforce a superior flag-officer, at *Jamaica*, or elsewhere, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer, before the inferior flag-officer shall arrive within the limits of the command of the superior flag-officer, and actually receive some order from him. Fourthly, That a *chief flag-officer returning home from Jamaica* or elsewhere, shall have no share of the prizes taken by the ships or vessels left behind to act under another command.” Now these clauses were evidently designed to prevent disputes between two flag-officers, respecting the one-eighth part ; but the present question is between a flag-officer and a captain, whether the captain shall receive three-eighths, or only two, and the flag-officer the remaining third. But by the usage of the navy, and the fair construction of the former part of the proclamation, a captain is only to have the whole three-eighths, when he does not act under the command of a flag-officer, but receives his orders immediately from the Admiralty, or when he takes a prize in pursuance of a plan formed by himself. But allowing the latter clauses of the proclamation, to be applicable to the present case, they are clearly in favour of the plaintiff. A flag-officer coming new on a station has no right to any share of prizes taken by ships on that station, before he actually arrives and takes upon him the command. The reason of this exclusion must be, that he has not been assisting or directing, by giving orders. In other cases the right is vested from the time of giving the orders. By the fourth regulation a flag-officer returning home, is to have no share in prizes taken by ships left behind *under another command*. But when he does not leave the ship under another command, (as in the present case,) then his right is not taken away : unless he were intitled by the other clauses, this restriction would be superfluous. If the right of the flag-officer were divested merely by quitting his station, it would be absurd to specify the case, of leaving ships behind *under another command*. By the course of the navy, a captain once under the command of a flag-officer, continues so

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till another is appointed. Here the words another command must be taken to mean the command of another flag-officer.

But in truth these clauses relate only to questions between two flag-officers. It appears from a search made in the offices, that before the year 1744, the proclamations in time of war, contained no particular regulations respecting the share of flag-officers, which then stood upon the general rule. In that year, regulations were inserted. The first was the same as that in the present proclamation: the second, that no flag-officer sent out should have any share, &c. "before he arrived within the limits of his command:" the third, similar to the second, with regard to an inferior flag-officer sent out to reinforce a superior: the fourth, that a chief flag-officer returning home should have no share in prizes taken "by ships, &c. left behind at *Jamaica* or elsewhere after he was got out of the limits of his command." In the year 1756, these regulations were altered pursuant to a representation from the Lords of the Admiralty, to whom the matter was referred by an order of the King in council, to the form in which they stand at present. In the second article, instead of the words "before he arrives within the limits of his command," were inserted, "before he arrives at the place to which he is sent, and actually takes upon him the command." To the third article, were added "before they (the inferior flag-officers) actually receive some order from him" (the superior). In the fourth article, instead of the words "*ships left at Jamaica, or elsewhere after he is got out of the limits of his command,*" were inserted, "*ships left behind to act under another command.*" This comparative view clearly shews, that these regulations were designed merely to prevent disputes between flag-officers, where one was going out, and the other coming home, respecting the limits of their respective commands, when they were in such and such latitudes, and in that the year 1756, a more pointed description was given to the regulations, as they stood in 1744, which was adopted in the present proclamation, but which does not include the present case, there being no other commander on the *Lisbon* station, after commodore *Johnstone* had quitted it. In the case of *Taylor v. Lord H. Paulet* (a), it was decided that the plain-
tiff,

(a) *TAYLOR v. Lord H. PAULETT*, at *Nisi Prius*, 1759.

This was an action for money had and received by the defendant, as the admiral's share of a prize taken by the plaintiff's ship, which sailed from the *Downs* on a cruise under orders from defendant, who commanded as admiral on that station. The ground of the action was, that before the prize was taken the defendant's command was determined, he being superseded by Admiral *Smith*.

Admiral

tiff, who was in similar circumstances with Captain *Mann*, could not recover. In the case of (a) *Pigot v. White*, the prize was taken, after Admiral *Pigot* had arrived within the limits of his command in *America*, and actually superseded Admiral *Digby*. That case was therefore within the letter of the proclamation, and cannot be applied to the present.

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It was argued on the part of the defendant, that the commodore could only be intitled, if at all, under the general clause which gave one of three-eighths to a flag-officer, where the prize was taken by a ship under the command of a flag-officer; there

Admirals *Boscawen* and *Knowles* were called as witnesses to prove the discipline of the navy, in regard to the determination of an officer's command.—They both agreed that where an admiral detaches a ship from his squadron upon intelligence which he had himself received, and to execute a plan not prescribed to him by the Admiralty, but formed by himself, though he should be superseded before that ship had finished her cruise he continued answerable for her, and she does not become under the charge of the admiral who succeeded him till she has rejoined the squadron; and in such a case they both seemed to think, that the admiral who was accountable for the ship was entitled to the prize-money. But if the ship was detached by an admiral, in consequence of particular orders to him from the Admiralty to send one to such a station, or on a particular service named, the admiral had no further charge of this ship than while he was actually in command, but when he was superseded, transferred it, as he did his standing orders to the admiral who succeeded: and that the admiral upon the command at the time of the capture was intitled to the prize-money, notwithstanding the captain taking the prize had received no order from him.

Lord *Mansfield* had no doubt upon the words of the proclamation for the distribution of prizes, that the plaintiff could have no title to recover, because there never was an interval in which his ship was not under the command of an admiral; and therefore, though it might be a question, Whether the share of an admiral belonged to Admiral *Smith*, or to the defendant? yet without doubt the plaintiff was not intitled to it. His counsel did not accept Lord *Mansfield's* offer of a case made for the opinion of the court, but rather permitted him to be non-suited.

(a) *PIGOT v. WHITE*, *Easter*, 25 Geo. 3. B. R.

This was an action of assumpsit for money had and received to the use of the plaintiff. At the trial a case was reserved, which was in substance as follows: that Admiral *Digby* was in July 1782 commander on the *North American* station; that on the 7th September Admiral *Pigot* superseded Admiral *Digby* and took him under command; before which time Admiral *Digby* had sent out cruisers which after that date took several prizes. The question was, Whether Admiral *Pigot* was intitled to a share of these prizes as commander in chief?

Lord *Mansfield*. I certainly at the trial did not hint which way my opinion was, out of respect to the contending parties and the value of the thing. I told them I would if they pleased make a case of it. I have not a particle of doubt. In many cases of prizes, the value of the prize in question, and the hardship, have occasioned authoritative explanations by the King. But in a case like the present, there was no doubt from the beginning but that the admiral in command was always intitled to a share. Formerly indeed, the moment an admiral was appointed to a command he shared in all prizes taken on that station, even before he joined. But that is altered, for they cannot now have a share of prizes till they come within the limits of their command. It is no matter who gave the orders or who sent them out. The plaintiff was commander in chief at the time the prizes were taken, and therefore he is certainly intitled to the prize-money.

The three other Judges were of the same opinion.

Posita to the plaintiff.

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was nothing in the subsequent clauses which could give it him ; that his command on the *Lisbon* station could not be understood to have continued till the time of the capture, as he had accepted another, and the duties of both together were incompatible. *Dyer*, 159. 197. It was like an office by writ or patent which ceases, on the acceptance of another. If a sheriff issue his warrant to the bailiff to execute a writ, and before execution a new sheriff be appointed, the bailiff is under the direction of the latter. If a judge of one court be removed to another, and before his removal make an order, such order though executed is not considered as being under his particular direction. The object of the proclamation was, to encourage the captors actually on board, by giving them the prizes. There must be either an actual or constructive presence to intitle an officer as a captor. But in the present case there could be neither, the commodore having no authority over Captain *Mann*, at the time of the capture. His command must have ceased, either on the 19th of *January* when his new commission was made out, or on the 3d of *February* when he received it. From that time Captain *Mann* acted as the immediate officer of the Admiralty, to whom he was amenable. The express words of the proclamation are, "under the command of a flag-officer," but if a flag-officer be intitled under this clause, after he has quitted the former command and taken another, he would with equal reason be intitled to the end of the war, or if he were disgraced ; or his executor if he died, after giving orders, but before the capture. The 4th clause does not imply that another flag-officer must be left in command : *another command* means a different command, that of the senior captain left behind, was sufficient to answer such a description. It was not necessary that another flag-officer should be appointed, to put an end to the command of the deceased on the *Lisbon* station ; that was effected by his appointment to the expedition against the *Cape of Good Hope*. Where a flag-officer quits his station to return home, the command devolves on the senior captain ; but if it be thus when he is returning from his station, it must be so when his command is actually determined. As to the case of *Taylor v. Lord H. Paulett*, if Commodore *Johnstone* had been suspended as *Lord H. Paulett* was, the officer succeeding him would have been entitled, but here there was no other appointed. That case therefore is not in point. The case of *Pigot v. White* proves, that a flag-officer is not entitled to a prize merely by giving an order to cruise. There Admiral *Digby* had

had given the order, but Admiral *Pigot* had a right to the flag-officer's share of the capture. 1789.

It was replied,

That though the right of the deceased commodore depended on the former clause in the proclamation, yet the subsequent regulations might be called in to explain it. There are but two ways in which a command or office at common law once vested can determine : the first is, by direct revocation ; the second, by the acceptance of another incompatible with it. In the present case, the two commands were not incompatible. A general has often the command of two divisions of an army at the same time. So the command of two fleets, though it may be inconvenient, is not in its nature repugnant. The command then of the commodore on his former station, did not expire merely by his being appointed to another. If an officer dies, or is killed in battle after giving orders, he is considered as a captor with respect to a share in the prize, and his executors are intitled. In such case the command is determined, and yet the right attaches. If Captain *Mann*, not having any other orders, had disobeyed those given by the commodore, he would have been amenable to a court-martial ; but if the command was at an end, he could not be answerable for disobedience to an officer, whose authority did not exist. Obedience and command are co-relative terms ; if the order affected Captain *Mann*, his obedience was to the commander who gave it. The words " other command " in the fourth clause cannot mean that of a senior captain, since if that were the construction, the clause would be absurd, as no case could exist, where a ship would not be under another command ; they must therefore mean the command of another flag-officer. In the case of *Pigot v. White*, it was expressly stated that Admiral *Pigot* had taken Admiral *Digby* under his command, before the prize was made : there Admiral *Pigot* was the other flag-officer. Here there was no other flag-officer appointed, therefore Captain *Mann* was not left to act under " another command."

On this day, judgment was given by

Lord LOUGHBOROUGH, who after stating the case reserved, proceeded as follows :

On the argument it was contended in behalf of the plaintiff, that the late Commodore *Johnstone* was intitled to one-eighth part of the prize taken by Captain *Mann*, under that clause of the proclamation which gives such share to the flag-officer who should

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should be actually on board, or directing and assisting in the capture. It was also contended that the regulation respecting a flag-officer returning home was applicable to this case, and in favour of the plaintiff. That regulation is, that where a flag-officer is sent out to command on any station, he shall have no share of any prize taken by ships employed there, before he arrives at the place to which he is sent, and actually takes upon him the command; and that a flag-officer returning home shall have no share of the prizes taken by the ships or vessels left behind to act under another command. But it was said, that as the order was given by Commodore *Johnstone*, and as the cruise began under his command, and no other flag-officer appointed to succeed him, his command must be understood to have continued while the capture was made, and therefore the plaintiff was intitled to recover. On the part of the defendant, it was argued, that by the clause of the proclamation under which the right of Captain *Mann* attached, three-eighths of all prizes were given to the captain on board at the time of the capture, with an exception only of the case of a flag-officer being actually on board, or directing and assisting in the capture, who in such case was to have one of those three-eighths; and therefore to give a flag-officer any title to such share, it was necessary that the ship should be actually under his command at the time of the capture, but where he had quitted the command, he could not be intitled.

I am to declare the opinion of the court, that under the proclamation Captain *Mann* had a right to the whole three-eighths. To intitle any other person, it was necessary that two things should concur, namely, that both the order should be given, and the capture made, under the actual command of a flag-officer though it need not be under the same flag. The question then is, Whether the commission sent from the Admiralty on the 19th of *January* to Mr. *Johnstone*, appointing him to take another command, did not amount to a determination of his command on the *Lisbon* station? On this, our opinion is, that by fair and natural presumption, though it does not follow as a strict necessary consequence, when the Admiralty gives an order to an officer to go to the Westward, who before commanded to the Eastward, all his former duty ceases, unless there is some special reason to prove the contrary, from the time he accepts the other command. We therefore think in the present case, that as the prize was taken when Commodore *Johnstone* was not commander on that station, there must be

Judgment for the defendant.

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DRIVER on the several Demises of BURTON v.
HUSSEY and Others.Monday,
June 29th.

IN ejectment, a case was reserved for the opinion of the court, the material part of which, stated that

By a marriage settlement, *Mary Burton* was tenant for life of the premises in question, remainder to *Richard Williams* (the intended husband,) for life, remainder to trustees to preserve contingent remainders, remainder to *Sarah Bishop* (the intended wife,) for life, in bar of dower, &c. remainder to the first and other sons of *Richard Williams* and *Sarah Bishop*, in tail male, remainder to their daughters as tenants in common in tail general, remainder to *Mary Burton* in fee.

In order to discontinue an estate-tail it is necessary that the party discontinuing should be actually seized by force of the entail.

The marriage took effect, and some time afterwards, *Henry Burton*, the husband of *Mary Burton*, joined with her in levying a fine *sur cognizance de droit tantum* with release and warranty, of her remainder in fee, to her use for life, remainder to the use of the heirs of her body by the said *Henry Burton*, or any future husband in tail general, remainder to *Henry Burton* in fee. *Richard Williams* died in the life-time of *Sarah (Bishop)* his wife, but left no issue. *Henry Burton* also died without leaving issue, having devised all his estates, &c. whatever, to *Michael Burton*, his brother and heir at law, under whom the lessor of the plaintiff claimed. Afterwards *Mary Burton* and *Sarah Williams*, (late *Bishop*,) joined in levying a fine *sur cognizance de droit come ceo*, &c. of the premises, to the use of certain persons in fee, under whom the defendant claimed.

On this case, a doubt was suggested, whether the estate tail, which *Mary Burton* took by the fine *sur cognizance de droit tantum*, was not discontinued by the fine *sur cognizance de droit come ceo*, &c., and the remainder over to *Henry Burton*, divested and turned to a mere right, so as to take away the right of entry, and put the plaintiff to the necessity of bringing a real action.

But on a subsequent day, it was admitted by the counsel for defendant, (Serjts. *Adair* and *Runnington*,) that as *Mary Burton* was tenant for life under the settlement, when she joined in levying the fine *sur cognizance de droit come ceo*, &c. there was no discontinuance of the estate-tail in remainder. On this point, it was stated at the bar, and assented to by the bench, as a settled rule of law, that in order to work a discontinuance of an estate-tail,

1789. tail, it is necessary that the party discontinuing, shall be actually seised by force of the entail. *Litt. f.* 637.—*Bredon's Case*. 1 Co. 76.—*Earl of Clanricard's Case*, *Hob.* 273. (a)
 DRIVER *Stephens v. Britteridge*. 1 *Lev.* 34.—1 *Roll. Abr.* 634.—*Gilb.*
 v. *Hussey*. *Ten.* 117.—*Cruise on Fines*, 254, 255.

(a) *S. C.* 2 *Dunv.* 577. *Sir Thomas Raym.* 36. 1 *Siderf.* 83.

The Duke of St. ALBANS v. SHORE.

Monday,
June 29th.

Where in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action of debt for the penalty, brought by A. against B. on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant which goes to the whole consideration. So that where in articles of agreement for the sale of lands it was agreed that A. the seller should take

DEBT for 500 *l.* the penalty of articles of agreement.

The declaration stated the agreement to have been made between the plaintiff and defendant on the 30th of *March* 1787, by which the defendant was to purchase of the plaintiff a certain farm with the appurtenances, together with an acre and half of boggy land, at the price of 2594 *l.* which was to be paid at *Lady-day* then next, in the following manner; the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the defendant, at the price of 1820 *l.* (to be deducted from the before-mentioned sum of 2594 *l.*) the defendant to convey those premises at the expence of the plaintiff unless a fine should be necessary, the expence of which the defendant was to pay; and the plaintiff to make a good title to the defendant at his (the defendant's) expence, unless a fine or recovery should be necessary, for which the plaintiff was to pay, who, on executing the conveyances, was to receive the rest of the purchase-money. *All timber trees, elms, and willow trees, which then were upon any of the above estates, to be fairly valued, by two appraisers, and the prices or values thereof, to be paid by the respective purchasers of the estates at the time before mentioned; the rents of the respective estates to be received by the owners, till the 24th of March then next. It was also agreed, that in case the plaintiff should not be enabled to make a good title to the said estate before the said 24th of March, that agreement should be void. And although the plaintiff had done and performed every thing on his part, &c. yet protesting*

in part of payment, a conveyance of other lands belonging to B. the buyer, and it was also agreed that all timber-trees were then upon any of the estates, should be valued by appraisers, and paid for by the respective purchasers at a given time; to an action of debt by A. against B. for the penalty, on his refusal to complete the purchase, B. may plead that A. before the time cut down a certain number of trees, and thereby rendered himself unable to perform, and it was impossible for him to perform the agreement. To initle himself to the penalty the plaintiff must shew a strict performance on his part. Qⁿ. A. having covenanted to make a good title to B. at his expence whether it be a good averment, that A. was capable, ready and willing to make a good title if B. would have prepared the conveyance? Qⁿ. Also whether a breach was well assigned, stating that B. did not nor would accept the title; whether it ought not to have shewn that A. tendered a good title to him, which he refused?

that the defendant had not done any thing on his part, &c. “in fact, the said duke saith, that he the said duke always from the time of the making of the said articles of agreement, until and upon the said 24th day of *March* next ensuing the date thereof, and always since *bath been and is capable, ready, and willing to make a good title* to the said *William Shore*, of the said farm and premises, and boggy land so agreed to be purchased by the said *William Shore* as aforesaid, and to execute and cause to be executed, necessary and proper conveyances, and assurances, of the said farm, and premises, and boggy lands, to the said *William Shore*; if the said *William Shore* would have drawn and prepared the same for execution, according to the form and effect of the said articles of agreement, to wit, at *Hanworth* aforesaid: And the said duke avers, that he the said duke, before the 25th day of *March*, being *Lady-day* 1788, to wit, on the 22d day of *March* A. D. 1788, at *Hanworth* aforesaid, gave notice to the said *William Shore*, that he the said duke was *ready and willing at any time, to make a good title* to the said *William Shore*, of the said farm, and premises, and land, so agreed to be purchased by the said *William Shore*, and to execute and cause to be executed proper deeds, conveyances, and assurances, for that purpose, if the said *William Shore* would prepare the same, he the said duke then and there being, and still being *enabled to make, and capable of making, a good title*, to the said *William Shore*, of the said farm, and premises, and land, according to the form and effect of the said articles: yet the said *William Shore* did not, nor would, on or before the said 24th day of *March* next ensuing the date of the said articles of agreement, nor hath he at any time hitherto *drawn or prepared, or caused to be drawn or prepared to be executed any deed, conveyance, or assurance* whatsoever, of the said farm, and premises, and lands mentioned in the said articles of agreement, and so agreed to be purchased by the said *William Shore* as aforesaid, *nor did, nor would pay the said purchase-money, or any part thereof, nor did, nor would accept, the said title* according to the said articles of agreement: but on the contrary thereof, the said *William Shore* bath wholly neglected and refused, and still doth neglect and refuse, to draw or prepare any deed, conveyance, or assurance of the said farm, premises, and land, unto the said *William Shore*, or to pay the said purchase-money, or any part thereof, or in any wise to carry the said articles into execution, contrary, &c.”

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Plea—"That the said duke was *not capable, ready, and willing* to make, nor could he the said duke make a good title to the said *William* of the said farm so agreed to be purchased, according to the tenor and effect of the said agreement, &c. And for further plea, &c. that after the making of the said agreement, and before *Lady-day* then next following, to wit, on the 20th of *March A. D. 1788*, the said duke *cut down* divers, to wit, 500 of the said timber trees, 500 of the said elms, and 500 of the said willow trees, in the said declaration and agreement respectively mentioned, and by the said agreement agreed to be valued and paid for as in the said agreement is mentioned, *whereby the said duke disabled himself from performing, and it became, and was impossible for him to perform and fulfil the said articles of agreement, on his part, &c. for which reason, he the said William, declined and refused to carry the said articles into execution on his part, as he lawfully might, &c.*"

Replication,—Issue on the first plea, and general demurrer to the second. Joinder in demurrer.

This was argued in *Hilary* term last, by *Lawrence*, Serjt. for the plaintiff, and *Bond*, Serjt. for the defendant, and a second time in *Easter* term, by *Le Blanc*, Serjt. for the plaintiff, and *Marshall*, Serjt. for the defendant.

The arguments in support of the demurrer were in substance as follow :

The articles of agreement in this case, divide themselves into two branches. First, That the defendant was to purchase of the plaintiff a farm, &c. for 2594*l.* in part of payment, for which the plaintiff was to accept a conveyance of other premises. Secondly, That the trees growing upon any of the estates, should be valued and paid for by the respective purchasers. The object of the plea is to shew, that the plaintiff having cut down trees on his estate, was incapable of performing his part of the agreement, and therefore that the defendant was not bound to perform the other part. In order to support the plea, it must be proved that the matter contained in it was a precedent condition, for if it were not such a condition, the non-performance of it cannot be pleaded in bar. Where one part of an agreement is not the consideration of the other, non-performance of one part cannot be pleaded as an excuse for the non-performance of the other. In this case the agreement respecting the trees, was no part of the consideration of the act which the defendant was to perform, namely, to convey his estate, and pay the residue of the purchase-money,

money. Where there are mutual remedies, it would be unjust that the breach of one covenant should be alleged as a reason for the breach of another, because the damages arising from the one might be unequal to those occasioned by the other. The case of *Boone v. Eyre* (a) was similar to the present: there the covenant was for well and truly performing, &c. the breach was non-payment, and the plea in bar, that the plaintiff was not legally possessed of the negroes on the plantation: There Lord Mansfield said, if the plea were allowed, any one negro not being the property of the plaintiff would bar the action: So here, if this plea were allowed, any one tree being cut down, would be a bar to the plaintiff's demand. In *Hunlocke v. Blacklowe*, 2 Saund. 155. the terms of the agreement were as strong as the present, but there a similar plea was not allowed. To the same effect also is *Cole v. Shallett*, 3 Lev. 41. Though these were actions of covenant, yet the statute of 8 & 9 Will. 3. c. 11. has put actions of covenant and debt for a penalty on nearly the same footing, as in neither, more than the real damages sustained can be recovered.

(b) On the part of the defendant, three objection were made to the declaration, 1st. That the plaintiff had not shewn a sufficient performance of his part of the agreement to intitle him to bring an action for the penalty. * The conditions in this case seem to be what Lord Mansfield calls "dependent conditions," in which the performance of one depends on the prior performance of the other, and therefore till the prior condition be performed, the other party is not liable to an action for the non-performance of his part. *Dougl.* 691. (c)—It is not enough for the

(a) *BOONE v. EYRE*, B.R. *East.* 17 *Geo.* 3.

Covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes upon it, in consideration of 500 *l.* and an annuity of 160 *l.* per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and every thing therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea, that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

LORD MANSFIELD.—The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.

(b) The objections made to the declaration by Mr. Serjeant Marshall, which were noticed by Lord Leachborough in giving judgment are distinguished by asterisks*.

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plaintiff to aver, that he is ready and willing to perform his part; the defendant is not obliged to convey his estate to the plaintiff, before the plaintiff conveys to him. Even in covenant to recover damages for the non-performance of this agreement, the plaintiff must have shewn, that he had actually done all in his power to perform his part; but this being debt for the penalty, an action of a more harsh nature, the plaintiff must shew a precise performance; which is made a condition precedent. A court of equity on the same principle, will not decree a specific performance of an agreement, unless the party applying for the decree has exactly performed his part. Wherever performance is necessary to be averred, it must be shewn with such certainty, that the court may judge whether the intent of the covenant be performed. 5 *Com. Dig.* 43. * To make a good title means to convey by a good title; and he who is bound to convey, is bound to prepare and tender such conveyances as are proper to make a good title to the grantee. 1 *Roll Abr.* 465. l. 3. 2 *Lev.* 95. 1 *Ventr.* 255. 1 *Mod.* 104. * If it be said, that the defendant must prepare the conveyances, because he is to pay the expence of them, the answer is, that the law is otherwise. * If nothing be said of the expence, it shall be defrayed by the grantor, 1 *Roll Abr.* 422. l. 50. But where the grantee is to pay the costs, yet the grantor must prepare the conveyances. *Cro. Eliz.* 517. If he be bound to assure at the charge of the grantee, he must give notice what sort of conveyance he will make, *Halling's Case*, 5 *Co.* 22. b. In the present case, as neither party has done any act towards conveying their respective estates, neither can bring an action for the penalty. But if it should be holden that the defendant was bound to prepare the conveyances because he was to pay the expence, yet the plaintiff has not shewn a sufficient performance, since, for any thing that appears, a * fine might be necessary: and as such fine was to be at the expence of the plaintiff, and he was bound to levy it if necessary, he ought to have shewn, either that he had levied it, or that it was not necessary. But supposing the defendant was bound to prepare the conveyance from the plaintiff, then must the plaintiff be bound to prepare the conveyance from the defendant. If so, * the plaintiff ought to have stated, not only that he had offered to make a good title to the defendant, but also that he had prepared a conveyance from the defendant to him, had tendered it to the defendant to be executed, and demanded the difference in value; but that the defendant had neither pre-
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pared a conveyance from the plaintiff to him, executed the conveyance from him to the plaintiff, nor paid the difference.

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The 2d objection to the declaration is, that the plaintiff only states that he was *ready and willing to make a good title*, but does not shew * *what title*. If he in fact had no title, or could not make one to the defendant, the agreement was void by the terms of it, and it would be impossible for him to recover; this title is therefore an essential part of the case. But the validity of the title is a matter for the cognizance of the court, and therefore it must appear on the record, that the court may judge of it, and the defendant take issue on any of the facts which support it if untrue, or demur if it be insufficient. Here the performance is stated so generally, that no precise issue * can be taken on it. In covenant, the breach may be assigned as large as the covenant, because damages only are to be recovered; but in debt for a penalty a precise breach must be shewn, because a breach is a forfeiture of the whole bond. 1 *Ld. Raym.* 107. No issue can be taken on the word * *patron* or *heir*, 1 *Ld. Raym.* 202. But the word * *title* is of much more vague signification than either *patron* or *heir*. Where any thing is to be done as a precedent condition, an averment that the party was "ready and willing to do it," is insufficient, neither is an averment *paratus fuit & obtulit*, sufficient, unless he states that he was hindered by the other party. 2 *Saund.* 350. 1 *Roll. Abr.* 465. l. 40.: but *paratus fuit & obtulit*, is sufficient, where nothing is to be done on his part, before the other has done a prior act; *ibid.* The plaintiff therefore ought here to have shewn that he had actually made a good title to the defendant, and what that title was. *Hob.* 69. 77. *Cro. Jac.* 315. 425. 503. *Cro. Eliz.* 919. *Yelv.* 49. *Sid.* 467. *Doug.* 620 (a).

The 3d objection to the declaration is, that there are three breaches assigned in an action of debt, but it is not stated to be according to the form of the statute: for as before the *stat.* 8 & 9 *W.* 3. c. 11. only one breach could be assigned in an action of debt, if many be now assigned, notice must be taken of the statute in pleading. But the breaches themselves do not meet the covenant, not being breaches of the contract stated. They are, 1st, That the defendant did not draw or prepare any conveyance. 2d, That he did not pay the purchase money. 3d, That he would not accept the title. Now a * breach should be assigned in the words of the covenant; or at least it must contain

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the plain and obvious meaning of the covenant. But it has been proved, that the defendant was not bound to prepare the conveyance. The agreement also was, that he should satisfy the plaintiff, partly by conveying certain premises to him, and by paying him the remainder in money; not that he should pay the whole in money. This breach therefore ought to have been " * That the defendant did not convey to the plaintiff the premises which he agreed to convey, nor pay the difference." As to the 3d breach, it would have been proper, if the plaintiff had shewn a sufficient performance on his part; but the defendant could not accept, till the plaintiff had actually executed the conveyances.

With respect to the plea, it is to be observed that the agreement is not in two parts; the clause relating to the trees is not a new contract of sale, but the mode of valuation. It was understood that they were to go with the land. They were to be paid for by the respective purchasers; that is, by the purchasers of the land on which they grew, and were considered as part of the purchase. The value of land with timber growing on it, can only be fairly estimated by an appraisement of the timber. But a grant of land passes all woods and timber growing on it; *Co. Lit.* 4. a.; the appraisement is only to ascertain the value. Small timber growing is of great value, which if cut would be worth nothing. Thriving timber will pay 10 or 15 *per cent.* for the purchase money, and without it, the land may be of no value. If there be a covenant to leave all timber on the land, it is a breach for the party to cut them down, though he leave them. *Sir Tho. Raym.* 464. If the plaintiff has cut down any of the trees, he is not intitled to the penalty, because he has deprived the estate of certain qualities, which were an inducement to the defendant to contract. Admitting the authority of *Boone v. Eyre*, it is not applicable to the present case, there the value of the plantation was not altered by the loss of some of the negroes. No case has been adduced, where the subject matter of the contract was changed. This is one entire contract. The sale of the land is the sale of the timber. The defendant is called upon to pay for a thing different from that for which he agreed. Various cases might be put, where there may be an agreement for the purchase of one entire thing, and a particular mode of valuing a part of it.

It was replied,

That

That although it was objected, that the plaintiff had not shewn a sufficient performance on his part, yet he had stated that he was capable, ready, and willing to make a good title, and of which he had given notice to the defendant. This was sufficient. The plaintiff was not bound to execute the conveyances, unless the defendant had drawn and paid for them. As to the cases cited, where it was holden insufficient to state that the party was ready and willing to perform his part, there, some specific, certain act, was to be done; in which case, performance was necessary to be averred. But here the plaintiff was to make no conveyance without the consent of the defendant. The first class of cases only shews at whose expence conveyances were to be made, where there was no express agreement, but here by the covenant, the defendant was to pay it. As to the objection that a fine might have been necessary, that is answered by stating that the plaintiff gave notice to the defendant, that he was ready and willing at any time to make a good title. If a fine were necessary, the defendant ought to shew that it was necessary; the plaintiff agreed to levy it only if it were necessary. As to the case where the word "*patron*" was not sufficiently certain to take issue upon, it was in *quare impedit*, where the party was obliged to make out a title to himself, and shew an actual presentation. In the other class of cases cited where the words "ready and willing" were holden not sufficient, an absolute performance was necessary to be stated, because it was wholly in the power of the party to perform the act required. But where two things are to be done at the same time by different parties, it is enough for the party declaring to state that he was ready and willing to perform his part; especially where money is to be paid for the conveyance of an estate, in which case the party to whom the estate is to be conveyed, is not forced to pay, unless the other is ready and willing to convey. The ground of the decision in *Cro. Jac.* 315. was, that the plaintiff ought to have shewn by what title the plaintiff in ejectment recovered, since it might have been by his own conveyance, and then though the facts alleged were true, still there might be no breach of covenant. On this principle the case of (*a*) *Noble v. King* was decided in this court. So also in the other cases cited, where there were covenants for good title, and quiet enjoyment, it was necessary to state the title of those by whom the parties were evicted or disturbed; because the facts alleged might be

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(*a*) *Ant.* 341

1789. true, and yet the covenants might not be broken. The case cited from *Yelverton*, 49. was decided principally on the ground that the declaration ought to have shewn that *B.* the person who was to become bound according to the agreement, was in fact bound.

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SMOKE.

As to the third objection to the declaration, namely that the breaches are not stated to be assigned by virtue of the statute; that is matter of form, and not to be taken advantage of on a general demurrer. As to the objection that they are not breaches of the agreement stated; it is to be observed that they are in substance and truth breaches of the agreement. It sufficiently appears from them, that the defendant did not do what he was bound to do, that he neither prepared the conveyances, paid the purchase-money, or accepted the title of the plaintiff. He ought by some act on his part to have enabled the plaintiff to have done what he had agreed to do, namely to convey, &c. No answer has been given to the case of *Boone v. Eyre*, where the negroes were to pass with the land, as the trees in this case. There the damages for the loss of the negroes were unequal to those which would have accrued to the other party. There also a gross sum was stipulated for the negroes together with the plantation; here, there was only an agreement for a valuation. If any tree had been cut down, the defendant would have paid so much the less; and if there was any ideal value annexed to the growing timber, he ought to have stated it. The whole contract is not to be rescinded, by an alteration in the trees on the land, which were to be the subject of a separate valuation.

Cur. vult. advis.

On this day, the following judgment of the court was delivered by Lord LOUGHBOROUGH; who having stated the pleadings, said,

It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant, (if I may use the expression,) he is not intitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is, and if the plea be a good bar, the same consequence must follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of *Boone v. Eyre* was cited; but in that case, though the court of King's Bench held the plea insufficient, yet they laid down a clear and well founded

founded distinction, that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy; and for this plain and obvious reason, because the damages might be unequal. The cases also of *Hunlocks v. Blacklowe*, 2 Saund. (a) and *Cole v. Shallet*, 3 Lev. (b) were cited as being in favour of the plaintiff. But it is unnecessary to enter into the discussion of those cases; though perhaps doubts may reasonably be entertained of the doctrine laid down in *Saunders*, and though the case cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the court. For we found our opinion on the present case, on the ground of the distinction in *Boone v. Eyre*, which we think a fair and sound one. Then the question is, Whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the defendant? Now the duke clearly covenanted to convey an estate to the defendant, in which, all the timber growing on the estate was necessarily included. The timber was not dis-joined from the estate by the separate valuation of it. It was expressly agreed that all trees, &c. which then were upon any of the estates should be valued. But it is not to be permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it, between the time of entering into the contract, and that of performing it. There may be cases, where the timber growing on an estate, is the chief inducement to a purchase of that estate. But it is not necessary to inquire, whether it be the chief inducement to a purchase or not; for if it may be in any sort a consideration to the party purchasing, to have the timber, the party selling ought not to be permitted to alter the estate, by cutting down any of it. This is not an action of covenant where one party has performed his part, but is brought for a penalty, on the other party refusing to execute a contract. But to intitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part. We are therefore of opinion that the plea is a good bar to the action, and on this, we give our judgment. (c) My brother *Marshall* made some exceptions to the declaration, which it is not necessary to go into, but which speaking for myself, I think material. It is to be observed, that this is not a contract ab-

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(a) 112.

(b) 41.

(c) *Vide* the argument.

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BANS
v.
SHORT.

solutely and at all events to convey. Where a man undertakes to convey, he undertakes to convey by a good title. There are cases where a court of equity has holden, that a party so undertaking might make a title by procuring an act of parliament, and that he was bound to purchase in all outstanding terms to make a good title. But in this case if the plaintiff was not enabled to make a good title before a certain day, the agreement was to be at an end, he might be off, and was released from his engagement. He therefore undertook to make a good title before a given time: the breach assigned is, that the defendant refused to accept the title. But what title? What exhibition of title? What title was tendered to him? What was there for him to accept? This perhaps is rather *dehors* the question, though it might be material if it were necessary to take it into consideration. But the ground of our determination is, that the plea is good, as I before stated, within the distinction laid down by the court of King's Bench in the case of *Boone v. Eyre*.

Judgment for the defendant (a).

(a) [See Mr. Durnford's note in pa. 157 | covenants.—See also *Terry v. Duntze*, post.
of *Willen's Reports*, for a digested arrange- | vol. 2. p. 389.]
ment of the cases in the several sorts of

Wednesday,
July 1st.

GERARD v. DE ROBECK and Another.

An under-
taking of the
plaintiff to
give material
evidence
where the
venue is laid,
may be sup-
ported by
proof of the
cause of ac-
tion being in
a foreign
country.

ADAIR, Serjt. in *Easter* term, shewed cause against a rule to change the *venue* from *London* to *Cornwall*, by producing an affidavit that the cause of action arose at *Port l'Orient*, in *France*, which prevented him from undertaking to give material evidence at any place in *England*.

The court suggested, whether an undertaking to give material evidence in *London* would not be fulfilled, by proving the cause of action at *Port l'Orient*, by the same sort of fiction as is used in a declaration, in which the cause of action may be laid in a foreign country "to wit, at *London* in the parish and ward, &c."

Afterwards *Adair* said he was ready to enter into a special undertaking of this kind, suited to the circumstances of the case. In answer *Kerby*, Serjt. cited the case of (a) *Woolnorgh v. Boys*, in which, on a motion to change the *venue* from *London* to *Suffolk*, an affidavit was made by the plaintiff, that the cause of action arose at *Dunkirk*, and not in *Suffolk*; and the court, after consulting

(a) In this court, *Mich.* 1785.

all

all the officers, held that the cause shewn was not sufficient, unless the party had undertaken to give material evidence in *London*.

Lord LOUGHBOROUGH said, that as the introducing a new method of practice might cause confusion, the plaintiff must undertake in the usual manner to give material evidence in *London*, and leave it to be considered at the trial, or afterwards by the court, how far evidence of the cause of action at *Port L'Orient* might by fiction of law support such an undertaking.

The rule was therefore discharged on an undertaking to give material evidence in *London*.

The cause went to trial, and a verdict was found for the plaintiff, evidence being given that the defendants, who were partners in trade at *Port L'Orient*, had at a meeting of their creditors at that place, acknowledged a debt to the plaintiff of 3000*l*.

On this day *Kerby* moved to set aside the verdict and enter a nonsuit, on the ground that the plaintiff had not fulfilled his undertaking. But

The court were unanimously and clearly of opinion—that the undertaking to give material evidence in *London* was by fiction of law well supported by proof of the debt in *France*, and therefore

Refused to set aside the verdict.

JAMES v. MOODY.

THE plaint in replevin being removed by the defendant into this court from an inferior one by *recordari facias loquelam*, returnable in fifteen days of *Easter*, (and which was filed on the (a) 29th of *April*,) the defendant signed judgment of *non pros* for want of a declaration, after having given a rule to declare.

A rule was obtained to shew cause why the judgment should not be set aside, on the ground that no demand of a declaration was made. But

The court held that such a demand was not necessary, and therefore

Discharged the rule with costs.

Kerby Serjt. for the plaintiff, and *Adair* Serjt. for the defendant.

(a) i. e. the appearance day of the return.

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BECK.

Wednesday,
July 12.

The plaint in replevin being removed by the defendant into this court by *re. fa. lo.* which is filed on the appearance day of the return, and a rule to declare being given, he may sign judgment of *non pros* for want of declaring without demanding a declaration.

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Wednesday,
July 1st.

WOULFE v. SHOLLS.

To support, in the next term after that in which issue is joined, a rule for judgment as in case of a nonsuit, for not proceeding to trial, the affidavit must state, that issue was joined early enough in the preceding term for the plaintiff to have proceeded to trial in that term. But in the third term, a general affidavit stating that issue was joined in the former term is sufficient.

A Rule was obtained on a former day by *Bond* Serjt. to shew cause why there should not be judgment as in case of a nonsuit, for not proceeding to trial in due time after issue joined, on an affidavit which stated generally, "that issue was joined in the last term, &c."

Marshall, Serjt. shewed cause, insisting that according to the practice of this court, the defendant was not intitled to the judgment for which he applied without shewing that issue had been joined early enough in the last term for the plaintiff to have tried his cause in that term. For any thing appearing on the affidavit, issue might have been joined too late for that purpose, the defendant therefore had not stated precisely what was necessary to support the rule.

The court were of this opinion, but said that in the next term such a general affidavit would have been sufficient.

Rule discharged (a).

Vide *Frampton v. Payne*, ante, 65.—and *Baker v. Newman*, 123.

(a) 2g. Whether it does not appear from hence, that if issue be joined early enough in a term, the plaintiff must proceed to trial in the same term; if not, at all events in the next term?

THE END OF TRINITY TERM.

C A S E S

1789.

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Thirtieth Year of the Reign of GEORGE III.

BARBE *qui tam* v. PARKER.

Saturday,
Nov. 7th.

THIS was an action for the penalty of the stat. 12 *Anne*,
st. 2. c. 16. against usury, tried at *Guildhall* before Lord
Loughborough in last *Trinity* term, in which a verdict was found
for the plaintiff. The declaration stated that on the 16th of
May 1788, *Stephen Romer* drew two bills of exchange on *Wil-*
liam Keate, one for 46 *l.* payable one month after date, the
other for 45 *l.* payable two months after date; and that the bills
were accepted by *Keate*.

It then stated that it was corruptly agreed between *Romer* and
the defendant, that the defendant should discount for *Romer* the
said two bills of exchange, "for gold, that is to say, that he
"should for such discounting thereof, have, receive, and take from
"the said *Romer* more than interest at and after the rate of 5 *l.*
"for the forbearing and giving day of payment of 100 *l.* for a year,
"that is to say, the same money as the profits of the said defendant
"would have been if the said *Romer* had bought of the defendant
"gold to the amount of the said two bills of exchange, and immediately
"resold the same again to him, and that *Romer* should indorse the
"bills to him." It then stated that the defendant discounted
the two bills, and advanced and lent to *Romer* the said sums of

In an action
for the pe-
nalty of the
statute 12
Anne, c. 16.
the declara-
tion stated a
specific sum of
money to
have been
lent, (in
which the
usury con-
sisted,) but
the evidence
was, that the
loan was part
in money, and
the rest in
goods of a
known va-
lue, which
the party
receiving the
loan agreed
to take as
cash: this
was good
evidence to
support the
declaration.

money

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money therein mentioned, that is to say, the said sums of 46 l. and 45 l. respectively, and did forbear, &c. &c.

And the plaintiff farther said, that the defendant by means of the said corrupt contract, took, accepted, and received of and from the said *Romer*, the sum of 4 l. 11 s. (as the profits which he the defendant would have made if *Romer* had bought of him gold to the amount of the said bills, and immediately sold the same again to him,) for the forbearance and giving day of payment, &c. which said sum of 4 l. 11 s. so taken, &c. exceeds the rate of 5 l. for the forbearance and giving day of payment of 100 l. for a year, &c. &c.

The count on which the verdict was taken was as follows: viz. "That it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said *Romer* and the defendant, that the defendant should lend to the said *Romer* another sum of money, to wit, 86 l. 9 s. and should forbear, and give day of payment of the same from the time of lending thereof, until the money mentioned in two certain other bills of exchange, respectively bearing date the 16th of *May* in the year last aforesaid, before then drawn by the said *Romer* upon the said *William*, and by him severally accepted for payment, to the order of the said *Romer* for two certain sums of money therein expressed, to wit, the sum of 46 l. at one month after date of the said bills, and the sum of 45 l. at two months after date, should become due and payable; and that the defendant for the forbearance and giving day of payment of the said 86 l. 9 s. for the said time last aforesaid, should have another sum of 4 l. 11 s. and that the said *Romer* for securing the payment as well of the said 86 l. 9 s. so lent as last aforesaid, as the said 4 l. 11 s. and for the forbearance and giving day of payment of the same as last aforesaid, should indorse the said two last-mentioned bills of exchange, and deliver the same so indorsed to the defendant; and the plaintiff who sues as aforesaid further says, that in pursuance of the said last mentioned corrupt contract, the defendant after the making thereof, to wit, on the said 17th day of *May* 1788, at *London*, &c. did lend to the said *Romer*, the said last-mentioned sum of 86 l. 9 s. and did then and there forbear and give time of payment of the same from thence, until the money mentioned in the said two-last mentioned bills of exchange severally became due and payable; and the said *Romer*, for securing to the defendant pay-

ment

ment as well of the said sum of 86*l.* 9*s.* so lent as last afore-
 said, as the said 4*l.* 11*s.* for the forbearance and giving day of
 payment of the same as afore said, did then and there, to wit, on
 said 17th day of *May*, in the year last afore said, at *London, &c.*
 indorse the said two last-mentioned bills of exchange, and
 thereby appoint the contents thereof to be paid to the de-
 fendant: and then and there delivered the same, so indorsed to
 the defendant; and the plaintiff who sues as afore said, further
 says, that the defendant under and by means of said last men-
 tioned corrupt contract, so made as last afore said, after the
 making thereof, to wit, on 17th of *May*, in the year last afore-
 said at *London, &c.* had, took, accepted, and received the said
 last-mentioned sum of 4*l.* 11*s.* for the said forbearance and giving
 day of payment, of the said last-mentioned sum of 86*l.* 9*s.* for
 the time last afore said and in manner afore said; which said sum
 of 4*l.* 11*s.* so had, taken, accepted, and received by the defend-
 ant as last afore said, for the forbearance and giving day of pay-
 ment of the said last-mentioned sum of 86*l.* 9*s.* as last afore said
 for the respective times last afore said, exceeds the rate of 5*l.* for
 the forbearance of 100*l.* for a year, &c.

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 v.
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At the trial the usury was clearly proved, as it appeared that
 upon application to the defendant to discount the bills, he
 refused to do it unless it were done "*as gold (a)*," to which
Romer, who had been a jeweller, consented, and received in
 discount 86*l.* 9*s.* which sum was paid in money, bills, and *old*
gold, part of which was a *gold tooth pick case*, which *Romer* said
 he believed was valued between him and the defendant, at
 eight guineas, but whatever the sum was, *he took the tooth pick*
case as cash, and immediately melted it down.

In the last term, a rule was obtained to shew cause, why the
 verdict should not be set aside, and a new trial granted, on the
 ground, that there was a variance; the count being, that the
 defendant lent to *Romer* 86*l.* 9*s.* but the evidence proving that
 part of the sum was taken in goods.

Against which *Adair* and *Bond*, Serjts. now shewed cause.

The verdict must stand, if the evidence can be applied so as
 to support it. The usury in this case was fully proved, and it
 is sufficient if the allegation be substantially made out. The
 law does not require so strict a method of proving a charge of

(a) This is explained in the first count of the declaration. The sum of 4*l.* 11*s.* is exactly the profit which the defendant would have gained by selling and re-purchasing gold of the value of 91*l.* (the amount of the bills) at the accustomed rate among goldsmiths.

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v.
PARKER.

usury in a declaration, on a penal statute, as in a plea; because in the latter case, the party pleading the plea has direct cognizance of the fact, but in the former, the transaction is presumed to be more secret, and the action brought by a stranger or common informer. 1 *Hawk. P. C. b. 1. c. 82. f. 24.* In *Floyer v. Edwards, Cowp. 112.* Lord Mansfield says, "in all questions, "in whatever respect repugnant to the statute, we must get at "the nature and substance of the transaction; the view of the "parties must be ascertained, to satisfy the court that there is "a loan and borrowing; and that the substance was to borrow "on the one part, and to lend on the other." So here it made no difference as to the usury, whether the loan was entirely in money, or partly in money, and partly in goods. The question is, Whether there was any evidence of the sum of 86 *l. 9 s.* stated in the count, being paid to *Romer*? but he expressly swore that part was paid him in money, and the rest in gold which *he took as cash.* The gold or any other goods given as money, shall be holden to be so, especially as against the party committing the usury. *Str.* 691; and it shall not lie in his mouth to deny it. It was the same as *Portugal*, or any other foreign coin, given in exchange, which would be as cash. In 1 *Wils.* 115. in an action on a promise to deliver up a bond pledged, on payment of the money borrowed, where the breach assigned was, that the defendant refused to deliver up the bond, though it was not stated that the money was paid or tendered, yet as a tender and refusal being proved at the trial, the evidence was holden to agree with and support the declaration. It was a question for the jury, Whether this was an usurious contract? and they by their verdict have determined it to be so.

Le Blanc and *Lawrence*, Serjts. in favour of the rule, contended that the count was not supported by evidence. The ground of the action is a contract by which *Romer* was to receive 86 *l. 9 s.* It is stated, that so much money was actually paid to him; this ought strictly to be proved. It appeared that he did not know with certainty, how much the gold tooth pick case was worth; but the statute annexes the penalty to the taking more than legal interest, "by way or means of any corrupt bargain, loan, exchange, chevifance, shift, or interest of "any wares, merchandizes, or other thing or things whatsoever," it ought therefore precisely to have been set forth, in the count, how the usury was committed, whether by loan, exchange, wares, merchandize, &c. or otherwise. If the gold had been sold for
more

more than the estimated value, *Romer* would have paid less interest, and perhaps no usury would have been incurred; the interest might have been either less than five *per cent.* or exactly to that amount. But though the usury be proved, yet it is not the same usury, and not being the same, there is a variance. The principle to be collected from the cases on this point is, that where a contract is stated, whether it be the essential ground of the action, or whether it be matter of inducement, such contract must be specifically proved. *Cudlip v. Rundle, Carth.* 202.—*Bristow v. Wright, Doug.* 665 (a).—*King v. Pippet, 1 Term Rep. B. R.* 235.—And in *Carlisle v. Trears, Cowp.* 671. It was determined, that where an usurious contract was not proved as laid in the declaration, it was a fatal variance. As to the case of *Floyer v. Edwards*, it is not stated what the declaration was in that case, neither was there any question of a variance: it goes only to shew, that an usurious contract shall not be covered by a sale of goods, and the statute evaded. What the contract was, must be collected from the whole transaction; but that proves it to be a contract both for a loan of money and of goods; yet the contract stated in the declaration is only for money; and the statute distinguishes a loan of money from a loan of goods. In an action in the common form for goods sold and delivered (b), tried before Mr. Justice Buller, the contract proved was, that the goods should be paid for, partly in money, and partly in buttons, and the plaintiff was nonsuited, not having declared on the special agreement.

Adair, in reply:

The cases cited on the other side may be divided into two classes; the first, where it is necessary that a contract should be proved as laid; the second, which was last cited, where goods were not allowed to be considered as money. As to the first, the rule of law is not disputed; and it has been complied with in this case; the contract has been proved substantially as stated: it is laid that a certain sum of money was advanced, and proved that the sum was paid in cash, and what was equivalent to, and accepted as cash. As to the last case, it shews only, that where part of a contract for goods is to be paid for in other goods, the party shall not be permitted to recover the whole in money, by saying the other goods were money: but where there is a contract for the loan of money, and part of it is given in goods

(a) Last edition.

(b) *Harris v. Fowle*. Sittings at Guildhall after Mich. term 1787. which

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PARKER.

which are taken as money, the party giving them, shall not be permitted to deny that the contract was for money, or that it was proved, by such evidence as was here given.

LORD LOUGHBOROUGH.—My opinion continues the same as it was at the trial. It has been truly argued by my brother *Adair*, that the contract was proved as laid; and that it was not originally a contract for the delivery of goods, but for a loan of money. Yet I agree with my brother *Lawrence*, in the case which he mentioned, where there was a contract partly for money and partly for goods, because there it is obvious, that as the party had an interest that the contract should be performed specifically as laid, it was incumbent on him to enter into the transaction. But here, both parties enter into a contract for a loan of 86 *l. 9 s.* in the execution of which, by mutual consent, a piece of gold is accepted as part of that sum. Suppose *Parker* had brought an action against *Romer* for 86 *l. 9 s.* as money lent, would it have been competent to *Romer* to have said, “you never lent me so much money, goods were part of it?” the answer to that would have been, “you have agreed to take it, not as goods, but as money, you may make the goods represent money, as well as money represent goods.” *Parker* delivers this piece of goods not as a commodity to be sold, but as a thing of specific value, as an aliquot part of the money; and *Romer* so takes it; then with respect to him, this is to be taken as constituting so much of that common measure of the value of the commodity. It is making the commodity itself stand in the place of the thing which constitutes the value. I lay no stress on the commodity being gold. I think if any other commodity of less easy sale had been so estimated, the case would have been precisely the same. If my brothers therefore see no reason to differ from me, the verdict ought to stand.

HEATH, J. (a)—I am of the same opinion. The declaration seems to me to be well framed, and sufficiently proved. It would make a great difference, if the delivery of the goods were to be a part of the shift, and no part of the original contract. I do not see two contracts, as it was said; there appears to me to be but one; and a piece of bullion was substituted as coin.

WILSON, J.—I am of the same opinion. There is no doubt but that if the goods had been part of the cover or shift, it

(a) *Mr. Justice Gould* was absent.

should have been stated; as that would have been in the description of the offence. Though I am not inclined to dispute those cases which my brother *Le Blanc* has cited, where the contract, which is the first substantial part, differs from that which is stated; yet in this case, as I understand the evidence, they took it clear that the contract was for a loan of money. The first communication with the defendant was not for a loan of money, but simply to have two bills discounted; that is, to have them discounted on the common terms of five *per cent.* The answer to that by the defendant is not, "if you will take a toothpick case, or part of it in goods, I will discount the bills. I confess I at first understood it so, and so understanding it, I had a decided opinion on it; I was misled by his saying, "it is not worth my while to discount the bills unless you will do it as gold," for taking the toothpick case as gold, I thought he was to take it for eight guineas, which perhaps was not worth five; if so, I should be of opinion that it ought to have been stated in the declaration. But the contract was, "I must have 4 *l.* 11 *s.* for the forbearance of 86 *l.* 9 *s.* only for two months: that is the contract, and when *Romer* comes to take the money, he says, "I received a toothpick case, and I received some bills, I cannot tell what, but I took it all as cash; I took it as cash, and I immediately converted it into cash, by putting it into a crucible; I converted it into that which if carried to the Mint, would have been made into guineas." This neither increased nor lessened the usury.

Rule discharged.

GUNNIS and others v. ERHART.

Monday,
Nov. 9th.

THE plaintiffs were trustees for the sale of a copyhold estate, which was sold by auction. In the printed conditions of the sale, the premises were stated to be free from all incumbrances; the defendant bid for them, and they were knocked down to him; but on discovering that there was a charge on the estate of 17 *l.* *per annum*, he refused to complete the purchase. In consequence of which, this action on the case was brought.

The verbal declarations of an auctioneer at the time of the sale are not admissible evidence to contradict the printed conditions.

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At the trial (which came on at *Guildhall* at the sittings after last term) the counsel for the plaintiffs offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction room, when the estate was put up, that it was charged in the manner above specified.

This evidence Lord *Loughborough* refused to admit, and the plaintiffs were nonsuited.

On this day *Bond*, Serjt. moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted, on the ground that the above evidence ought to have been admitted. But

The court were clearly of opinion that the evidence was not admissible, as it would open a door to fraud and inconvenience if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and no proof was offered that the defendant had any particular personal information given him of the incumbrance in question.

Rule refused.

Wednesday,
Nov. 11th.

BROOKS, one, &c. v. MASON.

Before an
attorney can
bring an ac-
tion for his
fees he must
leave the bill
with his cli-
ent accord-
ing to 2 Geo.
2. c. 23.

THE plaintiff brought an action in the usual form against the defendant for business done as an attorney, but was nonsuited at the trial, having failed to prove a proper delivery of his bill previous to the action, in compliance with *stat. 2 Geo. 2. c. 23. s. 23. (a)*

The circumstances were, that the plaintiff had delivered the bill in due time to the defendant, who acknowledged the debt, said he would pay it, but that he did not know what to do with the bill. Upon which the plaintiff *took it back again (b)*.

Bond, Serjt, now moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted, contending, that the bill, under the above circumstances, was properly delivered according to the statute. But

(a) Which enacts, "That no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively, shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements." &c.

(b) There was no proof offered that the defendant desired him to take it back.

The

The court were of a different opinion, saying that the bill 1789.
ought to have been *left with the defendant*, as it was the intention
of the statute, that the client should have due time to examine
the charges made by the attorney, and take advice upon them BROOKS
if necessary; and therefore v.
MASON.

Refused the rule.

COLLIER v. GODFREY.

Monday,
Nov. 16th.

THE additional bail in this cause were going to justify them-
selves in court, when it was objected by *Bond*, Serjt. that
it appeared from the notice of justification, that they had not
actually become bail, before that notice was given according to
a rule of this court (a), *Misc. 18 Geo. 3.* This was holden to
be a sufficient objection, and Bail must
actually
have become
so before
notice of
justification
is given.

The bail were rejected.

(a) See *Impey's New Inst. Cler. C. P.* 153.

BOURCHIER v. WITTLE.

Monday,
Nov. 16th.

COCKELL, Serjt. moved to set aside the proceedings on a
common *capias* for irregularity, because there were not fifteen
days between the teste and return. But the court said the
practice was to allow the teste to be amended, and therefore
Cockell took nothing by his motion (a). If there be
not 15 days
between the
teste and re-
turn of a ca-
pias, the
court will
allow the
teste to be
amended.

(a) See 1 *Bof. & Pull.* 342. *acc.*

MEARS v. GREENAWAY.

Tuesday,
Nov. 17th.

IN this action of trespass, for an assault and battery, the first
count of the declaration after having stated in the usual
way, that the defendant assaulted the plaintiff, and beat and
bruised him, &c. &c. &c. went on in the following words:
“ *And the said John (the defendant) then and there tore, rent,*
“ *spoiled, damaged, and destroyed, the cloaths and wearing apparel of*
“ *the said Francis, (the plaintiff,) to wit, two coats, two waist-*
“ *the cloaths, &c. of the plaintiff, (specifying them,) wherewith he was then and there clothed,*
“ *and which he then and there had on, &c. and the damages are found under 40s. and the judge does*
“ *not certify, the plaintiff is not intitled to more costs than damages,*
“ *there tore,*
“ *said de-*
“ *endant*
“ *then and*
“ *coats,*

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“ coats, one pair of breeches, one hat, one wig, one shirt, one stock,
 “ one neckcloth, two handkerchiefs, one pair of shoes, and two pair of
 “ stockings, wherewith he was then and there cloathed, and which
 “ he then and there had on, of the value of 20 l. so that they became of
 “ no use or value to him the said Francis.” There were two other
 counts, but they did not state the spoiling of the cloaths.

The defendant pleaded the general issue, and a verdict was found for the plaintiff, with *five shillings damages*; but the Judge did not certify. The prothonotary allowed full costs to the plaintiff: in consequence of which, a rule was obtained to shew cause, why he should not review his taxation; against which

Le Blanc, Serjt. now shewed cause. The statute 22 & 23 Car. 2. *st. 2. c. 5.* directs that in all actions of trespass, assault, and battery, and other personal actions, where the damages are under 40 s. the plaintiff shall not recover more costs than damages, except where the Judge shall certify that the assault and battery was sufficiently proved, or that the freehold, or title of the land mentioned in the declaration was chiefly in question. Now this cannot be extended by fair construction, except to cases where the Judge has it in his power to certify, namely, where the question only relates to an assault and battery, or to the title of land: but in the present case an injury is charged to be done to the personal chattels of the plaintiff, who having obtained a verdict is intitled to his full costs, whether the damages amount to 40 s. or not. The defendant might have had a finding, which would negative that charge; the plaintiff could only have a general verdict: it must now therefore be taken, that the defendant was proved to have done the injury with which he was charged. It is a distinct substantive allegation, though not contained in separate counts. In *Thomson v. Berry, Strange*, 551. the trespass was stated in one count, and in *Arnold v. Thompson*, 1 Barnes, 91. two distinct charges were also contained in one count. In *Carruthers v. Lamb*, 1 Barnes, 91. the plaintiff in similar circumstances with the present, recovered full costs; and the opinion of Mr. Justice Buller in (a) *Cotterill v. Tolly* goes to establish the right in this case. In (b) *Hamson v. Adshhead*, though the plaintiff had no more costs than damages, because the injury to the cloaths was laid as a consequence of the assault, yet it clearly appears from that case that he would have been intitled to full costs, if the wetting the

(a) 1 Term Rep. B. R. 655.

(b) Sayer's Costs, 32. and Bull. N. P. 329.

cloaths had been charged as a distinct fact. It does not follow that the tearing the cloaths was in this case consequential to a battery, notwithstanding it is stated that the plaintiff, "then "and there had them on:" cloaths on the back of a person may be injured, without a battery being committed, though it would be an assault; and unless an actual battery were proved, the judge could not certify. The case then not falling within the *stat. Car. 2.*, the plaintiff is intitled to recover his full costs.

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Rooke. Serjt. contra. By the antient common law the plaintiff was not intitled to any costs. The county courts and courts baron were open to all the freeholders, who were bound to attend; and in those courts all disputes might be settled. After the conquest, the King's courts claimed jurisdiction of all trespasses committed *vi et armis*, because as they were breaches of the peace, a fine was paid to the King; but the inferior courts were still open to all other personal actions under 40s. Thus stood the law when the statute of *Gloucester* was passed. That statute gave costs in all cases where damages might be recovered at common law, and consequently in all personal actions sounding in damages. But the same statute specially provided against bringing defendants wantonly into the King's courts, to answer trifling demands or fictitious complaints: the 8th chapter confirms the jurisdiction of the county courts, puts a check on certain actions in the King's courts, and requires an affidavit in cases of trespass *de bonis asportatis*, that the goods were worth 40s.; and in cases of battery, that the plaint was true. But it appears from 2 *Inst.* 311. that this affidavit was soon disused, or rather never put in practice. Consequently plaintiffs were suffered to bring actions for trifling causes in the courts at *Westminster*, to the great oppression of the defendants who might be ruined if the smallest damages were recovered, and the King's courts were employed in determining trifling causes. To remedy this, the *stat. 43 Eliz. c. 6.* was passed, the preamble of which sets forth that it was made to prevent trifling suits being prosecuted in the courts at *Westminster*, and the second section of which gives a power to the judge to prevent, if he pleases, the plaintiff from recovering more costs than damages, by certifying that the damages do not amount to 40s.; with an exception only to the case of a title or interest in lands, the freehold or inheritance of lands, and of a battery. In all other cases the judge might by his certificate prevent more costs than damages from being allowed, where the damages were less than

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40*s.* But it appears from the judgment of Lord Chief Justice *Willes*, in (a) *Milborne v. Read*, that no certificate had ever been granted under this statute of *Eliz.* In consequence of this, and to provide a further remedy, the stat. 22 & 23 *Car. 2. c. 9.* was made; which instead of leaving the matter to the discretion of the judge, directs that in all actions of trespass, assault, and battery, and other personal actions where the damages are under 40*s.* shall the plaintiff recover no more costs than damages, unless the judge shall certify that an assault and battery was sufficiently proved, or that the freehold or title of land was chiefly in question. The obvious construction of which is, that in no personal action whatever, shall the plaintiff have more costs than damages, if the latter be under 40*s.* except in cases of freehold or battery; and not even in these without a certificate. In the first cases which arose on the stat. of *Car. 2.* the court seemed to adopt this construction. *Earl of Pembroke v. Westhall*, 3 *Keb.* 121. *Claxton v. Laws*, 3 *Keb.* 247. But in subsequent decisions, the courts put a different construction on the act, and the law is now settled, that the stat. *Car. 2.* extends only to cases in which the judge *can* certify, namely, to cases where the freehold is in question, and the assault and battery sufficiently proved. 3 *Wils.* 324. But of late it has been considered as a hardship on defendants, that they should be brought to answer in the courts of *Westminster* for trifling offences, or claims: certificates have accordingly been granted under 43 *Eliz.* and the construction of 22 & 23 *Car. 2.* has been extended by modern determinations. *Glegg v. Molyneux*, *Doug.* 780. In cases of trespass merely for driving the cattle of the plaintiff, or of an injury to a mere personal chattel, he is entitled to full costs, because no title of freehold can come in question; the case is therefore not within stat. 22 & 23 *Car. 2.* but remains as under the statute of *Gloucester*, and if there be no certificate, unrestrained by 43 *Eliz.* But trespass for breaking and entering a barn, locking the door and detaining goods where the damages were under 40*s.* did not carry full costs, because the title to the freehold might have come in question, and the injury to the goods should have been stated in a distinct independent count. *Reeves v. Butler*, *Gilb. Rep.* 199. So in *Glegg v. Molyneux*, the carrying away the turf was an injury consequential to the trespass, and the judge not having certified, the plaintiff had no more costs than damages.

(a) Cited in 3 *Wils.* 323.

As to the tearing the cloaths being distinct from the battery, and the tradition that a *laceverit* carries costs, it is not always true: it is not so in trespass *quare clausum fregit*, *Gilb. Rep.* 198. There is no authority to shew that in a declaration framed like the present; the tearing would intitle the plaintiff to full costs; it states the cloaths to have been on the back of the plaintiff: the tearing of them was therefore of itself a battery. *Carruthers v. Lamb* was decided only in the treasury, and does not set forth the declaration. In *Hamson v. Adshhead*, it was holden that if the declaration shews the injury to the cloaths to be consequential, there should be no more costs than damages: and in the present case it was consequential. So if the jury find it to be consequential. *Catterill v. Tolly*, 1 *Term Rep. B. R.* 655. In this case, the tearing the cloaths was necessarily preceded by a battery, as the plaintiff had them on. The judge might therefore have certified an actual battery sufficiently proved: but there is no certificate: the case then is within stat. 22 & 23 *Car.* 2., and the damages being under 40s. the plaintiff cannot recover more costs than damages.

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[*Kerby*, Serjt. *amicus curiæ*, then mentioned the case of *Atkinson v. Jackson*, in *C. B. Pasch.* 1786, which was a motion to tax the plaintiff his full costs. The declaration stated, that the defendant struck the plaintiff many violent blows, and flung and threw a large quantity of water upon and over the plaintiff, "and then and there not only wetted him, and put him in danger of catching cold, but spoiled his cloaths," &c.

On this 1 *Barnes*, 91. and *Sayer's Costs*, 52. were cited.

LORD LOUGHBOROUGH said, there was much perplexity in motions of this sort, but the sense seemed to him to be, that where the jury do not find 40s. damages, there should be no more costs than damages.

GOULD, J. observed, that the throwing the water and then and there spoiling the cloaths, tied the whole count and complaint together.

And the rule was refused.]

Le Blanc in reply. In the case of *Reeves v. Butler*, no injury was stated to personal property, except what might have called the title to the freehold in question, respecting the locking up the barn and detaining the goods. The ground of the decision in *Clegg* and *Molyneux* was, that the turf was part of the free-

1789. hold. As to *Atkinson v. Jackson*, the declaration is not stated with sufficient certainty to be relied on.

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LORD LOUGHBOROUGH.—There is no doubt in this case, that the same question might have been left to the jury, which my brother *Grose* asked them in the case of *Cotterill v. Tolly*, namely, Whether the tearing the cloaths were part of the same act for which they gave 5*s.* damages? If they had answered that it was so, there would have been no question. But it is the same thing if it appears on the face of the declaration; which after stating the beating, goes on to state that the cloaths of the plaintiff were spoiled, and then specifies each particular article, his coat, waistcoat, hat, wig, shoes, stockings, &c. Now I can only conceive one case in which, by any reasonable probability, the acts can be considered as wholly distinct; and that is, by supposing that the defendant had first beat the plaintiff, then stripped him stark naked, and spoiled his cloaths. But it is evident that one act was in consequence of the other; and the law is not to be evaded by a device of pleading.

GOULD, J.—There are two courses marked out for judges in cases of this kind, one by the stat. 43 *Eliz.* the other by 22 & 23 *Car. 2.* The first and best determination is in 3 *Kemble*, but that has been open to a great deal of subtle reasoning and distinction. Yet I think that the best construction, which best answers the end of the Legislature, and puts a stop to all frivolous actions, by restraining more costs than damages from being allowed in the cases specified. If therefore the declaration states the tearing of the cloaths to be done at the same time with the beating, the court will construe it so as to accomplish the object of the statute, and will hold the tearing to be part of the same act, and a consequence of the battery. It was well determined in the case in (a) 4 *Co.* that the words *adunc* & *ibidem*, united and coupled all together.

HEATH, J. of the same opinion. Whatever difference of construction there was formerly on the statute of *Car. 2.* it is now settled, that it must either appear on the face of the declaration or be found by the jury, that the tearing the cloaths is a consequence of the beating. But after a general verdict it is to be intended that it was so found; and this may be without violence to the cases determined in the *King's Bench*.

(a) *Walker's case*, 4 *Co.* 41. b.

WILSON, J. of the same opinion, that the plaintiff is not intitled to his full costs. The cases rest on the form of the declaration. If in an action of this kind the party chooses to forego the *tert* to his person, and goes only for the injury to his cloaths he would have his full costs. But if he will combine both together in one count, the case is within the statute of Car. 2. because the principal injury is the battery; and the judge may certify.

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Rule absolute (a).

(a) [See *Lockwood v. Stannard*, 5 Term Rep. B. R. 481. acc. on the authority of this case.]

SCOTT V. WHALLEY.

Thursday,
Nov. 19th.

JUDGMENT being entered on a warrant of attorney given with a bond to secure an annuity, payable quarterly by the defendant to the plaintiff, a *fiery facias* issued, on which the arrears of the preceding half year were levied on the defendant's goods. When the next quarter became due, another *fiery facias* was taken out, and a second levy made, but the judgment had not been revived. In consequence of this,

Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.* having issued for the arrears of the last half year, a second *fi. fa.* may be taken out for the next quarter without reviving the judgment.

A rule was obtained to shew cause why (amongst other things arising from objections made to the memorial enrolled pursuant to 17 Geo. 3. c. 26. but which the court thought trivial,) the goods levied under the latter execution should not be restored, on the ground that the judgment ought to have been previously revived by *fiery facias*.

This point the court thought worthy of consideration, but on this day they were clearly of opinion that it was not necessary to revive the judgment in order to sue out the second execution, and Mr. Justice GOULD mentioned the case of *Ogilvie v. Foley*, 2 Black. 1111.

Rule discharged with costs.

Marshall, Serjt. for the plaintiff, Runnington, Serjt. for the defendant.

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Saturday,
Nov. 28th.

CLAY v. WILLAN and others.

Where a carrier gives notice by printed proposals that he will not be answerable for certain valuable goods if lost, of more than the value of a specified sum, unless entered and paid for as such; and goods of that description are delivered to him by A. who knows the conditions but concealing the value pays no more than the ordinary price of carriage and booking; on a loss, the carrier is neither liable to the extent of the sum specified, nor to repay the price actually paid for the carriage or booking.

THE defendants were proprietors of a stage-coach, by which the plaintiff sent a quantity of light guineas to be carried from Wakefield to London. Two shillings were paid for the carriage and two-pence for booking. The following were the printed terms on which the defendants performed their business:

"Willan and Co. humbly beg leave to inform their friends and the public, that cash, plate, jewels, writings, or any such kind of valuable articles, will not be accounted for, if lost, of more than 5 l. value, unless entered as such, and a penny insurance paid for each pound value (a), when delivered to the book-keeper, or other person in trust, to be conveyed by any carriage that inns at the above inn."

The action was in the usual form against common carriers, and the plea the general issue. No money was paid into court. At the trial the plaintiff was nonsuited, it being proved that the person by whom he sent the parcel to the inn knew of the above terms, but had not discovered the contents of the parcel to the book-keeper, nor paid for them as valuables. A rule having been granted to shew cause why the nonsuit shall not be set aside and a verdict entered for the plaintiff, on the ground that he was intitled to recover as far as 5 l. by the printed conditions.

Rooke and Lawrence, Serjts. now shewed cause. On the fair construction of the printed paper the plaintiff is not intitled to recover even the 5 l. not having complied with the conditions; and the reason of those conditions is obvious; that if a parcel be above the value of 5 l. but does not contain jewels, plate, or the like, it would probably be of considerable bulk, and therefore not so likely to be lost or stolen. But it was contended at the trial, that by analogy to the case of insurance, the plaintiff was at least intitled to recover back the 2 s. 2 d. paid for the carriage and booking. Now an insurance is a mere contract of indemnity, but a carrier has a right to be paid for the trouble of the conveyance which he has actually taken. Yet an insurer is intitled to retain 10 s. per cent. where there is a return of premium. The plaintiff has also been guilty of a fraud; he

(a) It was said in the argument, that after the words "*pound value*," were added, "*over and above the common carriage*." But the printed paper produced in court was as above stated.

knew the conditions which the defendants printed, yet, by concealing the real value of the parcel, endeavoured to make them liable at all events. So where fraud has been manifest, the court have ordered an underwriter to retain the premium. *Park, Insurance*, 247. To the same point also is *Lewry v. Bourdieu*, *Dougl.* 468. and in (a) *Turner v. Gray*, the plaintiff having sent money and deeds by the *Nottingham* coach, and being asked by the book-keeper as to the value had denied it to be a parcel of value, was nonsuited, and not permitted to recover the money paid for the carriage. Another reason also why the plaintiff should not recover the 2 s. 2 d. is, that the defendant comes prepared only to resist the claim of 5 l., he has had no notice that the 2 s. 2 d. would be demanded, which was not the point to be tried: and it is laid down by Lord *Mansfield*, that where the parties come to trial on one ground, care ought to be taken that the defendant should not be surprised by another. 1 *Term Rep. B. R.* 134.

Adair and Le Blanc, Serjts. *contra*. The plaintiff is intitled either to recover the 5 l. or the 2 s. 2 d. The printed terms being of doubtful construction, the matter must be determined by the rules of good sense, and the common consent of mankind. The payment of 2 s. was a consideration fully adequate to the risk run, supposing the goods were not worth more than 5 l., when it appears from the conditions themselves, that only one penny would be the insurance for every additional pound value: and the two-pence paid for booking may be fairly deemed an additional insurance, over and above the common carriage: the price fixed included both an insurance of safety to the goods, and a compensation for the care and trouble of the carrier. The defendants underwrote, as it were, as far as 5 l. and on a total loss are to pay the money for which the risk was run; or, if there was no risk, are to return the premium. *Tyre v. Fletcher, Cowp.* 666. As to the case of *Turner v. Gray*, it appears that the plaintiff had there warranted the parcel not to be valuable, he therefore was not permitted to recover against his own warranty. The case of (b) *Hutton v. Bolton* is an authority

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(a) *Sittings after Trin. Term, 1785, Westminster.*

(b) *HUTTON and UX. v. BOLTON, B. R. East, 22 Geo. 3.*

This was an action of assumpsit against the defendant, the owner of a stage-coach, for losing a trunk belonging to the plaintiffs. Though the loss in point of value was full 50 l. the defendant moved for leave to pay 20 l. into court upon an affidavit, stating that he had long since published an (*) advertisement that he would not be answerable

* The precise terms of the advertisement do not seem to have been attended to.

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rity in favour of the plaintiff, in which no doubt was made of a carrier being liable to the extent of the sum beyond which he

for any parcels committed to his care above the value of 20*l.* unless he was paid in proportion to the risk; and that though the things lost in the present case exceeded that value, yet he was not informed of it, nor paid any thing extraordinary for the carriage.

On shewing cause against the rule, *Erstine* for the plaintiffs contended, that unless the demand is for a specific sum, the defendant cannot pay a specific sum into court; for which reason it cannot be done in any action founded on a tort, in trover, or where the action sounds merely in damages. 12 *Mod.* 397. The forms of actions are immaterial to the present point if the object and gist are the same. Though this action be on an implied assumpsit, yet a specific action on the case for negligence would have lain; and as in the latter, the motion could not be granted; neither ought it to be in the former, the object of both actions being the same. Here it is quite a matter of damages, for though the jury would give the value of the goods by their verdict, yet they may nevertheless extend it to damages for such inconveniences as the plaintiffs may have sustained from the non-delivery of them; the damages therefore being uncertain, the defendant cannot be admitted to pay money into court. No man can pay money into court but where under circumstances he may plead a tender; which could not be done in this case, inasmuch as nothing specific could be relied on. As to the advertisement which was the sole ground of the present application, the fact must be tried whether the plaintiffs had any notice of it. Notice to the public would not be sufficient to be effectual, it must be given to the party, which is mere matter of evidence to the jury.

Baldwin in support of the rule admitted that notice of the advertisement must be proved against the plaintiffs at the trial, or the payment of money into court would not avail any thing in favour of the defendant. This is a question of costs, and ought the defendant to be liable to costs if the plaintiffs should not recover any more than 20*l.* at the trial? The motion is made on the ground of an *express* contract between the parties; upon an express stipulation that 20*l.* is the extent of the retribution. This is not an appeal to the discretion of the court, but is a matter within the known principles which govern cases on stipulated contracts.

Lord *Mansfield*.—The governing principle in cases like the present is, that where the plaintiff makes that kind of demand, which is substantially for a specific sum of money, the defendant may move to pay money into court. In torts indeed it is otherwise; there it is a mere question of damages, a chance; and as in such cases the defendant was originally in the wrong, he must take the event of that chance. In the present case the defendant truly says, "I am by express stipulation liable only for 20*l.*" "and am ready to pay it to you." What is the question on the merits? Is it true? If so, he is right; if not, he pays the costs. As to notice of the advertisement, it is open to be tried.

Aphurß, J.—The whole question is, Who shall be liable for costs? which must fall on whoever is in the wrong: and if the fact were in the knowledge of both parties, it is but just and fair that the defendant should be permitted to pay the money into court. It is not litigating the value of the goods; the motion is a very reasonable application.

Buller, J.—Upon principle, I see no difficulty in suffering the money to be paid into court. This is an action of assumpsit; and the goods are stated to have been of a specific value. The declaration does not state any particular damage or inconvenience in consequence of, and independent of the loss, and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered. It is a declaration on the face of it only for the value of the goods. The defendant might have pleaded the fact, and a tender of the 20*l.* If so, this case comes within the general rule.

Rule absolute.

had

had declared by an advertisement, that he would not be answerable. As to the argument, that a fraud was practised by the plaintiff; though he did not pay a larger price for the carriage, yet the proprietors run no greater risk, took no more trouble, nor were put to any more expence in carrying the parcel, than if it had been only of the value of 5 *l.* they were therefore not injured by the concealment, which was clearly not a fraud. The plaintiff gave up his indemnity, and having insured only to the amount of part of the value, cannot recover more, but is intitled to that amount. The ground of the decision in *Lowry v. Bordieu* was, that the contract was executed, and the plaintiff had waited till the risk was completely run. But it appears from that case, that where there is no risk, the premium shall be returned. Neither were the defendants in the present case taken by surprise, with respect to the demand of 2 *s.* since it was stated in the declaration that 2 *s.* were paid for the carriage, and there was also account for money had and received.

The court took time to consider till the next day, when they declared, that the sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable; and therefore the rule for setting aside the nonsuit (*a*)

Was discharged.

(*a*) *Gibson v. Paynton* and another, 4 *Burr.* 2298. *Tyly v. Morrice*, *Carth.* 485.

SUMNER v. GREEN.

THE defendant in this case having been arrested on a *respondentia* bond, for 5900 *l.* a rule was granted to shew cause, why he should not be discharged out of custody on entering a common appearance. This rule was obtained on an affidavit, which stated, that the bond was given for goods shipped by the plaintiff, a *British* subject at *Calcutta* in the *East Indies*, on board an *American* ship homeward bound from thence to *Rhode Island* in *America*, which had previously landed in *Bengal* a cargo from *Europe*. And the question was, Whether the bond under the above circumstances was not void, by the 2d section of the statute 7 *Geo. 1. c. 21.*, which enacts, "That all contracts and agreements whatsoever, at any time from and after *June 24, 1721*, made or entered into by any of his Ma-

7 Geo. 1. c. 21. does not extend to all trading by *British* subjects in the *East Indies*"

"*jeffy's*

Friday,
Nov. 27th.

Where a defendant is arrested on a contract the legality of which is doubtful, and which may eventually subject the plaintiff to a penalty, the court will discharge him on entering a common appearance. *2d.* Whether the stat. 7 *Geo. 1.*

East Indies"

"*jeffy's*

1789.

SUMNER

v.

GREEN.

“ jesty’s subjects, or any person or persons in trust for them, for
 “ or upon the loan of any monies by way of bottomry on any
 “ ship or ships *in the service of foreigners, and bound or designed to*
 “ *trade in the East Indies* or parts aforesaid ; and *all contracts* and
 “ agreements whatsoever made by any of his Majesty’s subjects,
 “ or any person or persons in trust for them, for the *loading or*
 “ *supplying any such ship or ships with a cargo or lading of any sort*
 “ *of goods, merchandize, treasure, or effects, or with any provisions,*
 “ *stores, or necessaries, &c. &c. shall be void ?”*

Le Blanc and *Lawrence*, Serjts. now shewed cause, contending that the bond in question was not avoided by the statute ; the sole object and meaning of which, as it appeared from the title and preamble, was to prevent the subjects of *Great Britain* trading from *Europe* to the *East Indies* with foreign commissions, to the prejudice of the *East India* company : but this was a case of a foreign ship homeward bound, taking in a cargo at *Calcutta* to be carried from thence directly to *Rhode Island*. It was also improper that a question of such importance should be discussed on a summary application to the court, and not put upon the record.

Adair and *Bond*, Serjts. on behalf of the defendant, urged that the case was within the mischief designed to be remedied by the statute, the intent of which was not only to protect the exclusive right of the *India* company from other *British* subjects, but also to secure the trade to the nation itself, by preventing foreigners from sharing in it in any degree, and for that purpose, throwing every possible difficulty in their way. As to the objection to the mode of application to the court, it would be very oppressive to detain a foreigner in gaol, who probably would not be able to find bail to the large amount required by the bond, when the bond itself might turn out to be void.

LORD LOUGHBOROUGH.—We are all of opinion in this case, that the defendant ought to be discharged on entering a common appearance. But we do not think it necessary to give a decided opinion on the act, because, where the plaintiff has the defendant in custody, and the cause of the arrest being communicated in his own affidavit, appears by reference to the security on which the debt arises, it would be improper to hold the party in prison, if there appears a probable ground that the contract, which is the foundation of the action, is void. If the contract were not only void, but mischievous, the law
 might

might be evaded, if the plaintiff were permitted to retain the advantage which he has gained over the defendant, and make use of the opportunity of treating with him while in confinement; for possibly the merits of the case might then never meet the examination of a court of justice. I do not choose to enter into the construction of the statute, because the consequences are very extensive, since if it be as the defendant suggests, the security is not only void, but the other clauses go to subject the plaintiff to very considerable penalties: but I think it seems probable, that in its true meaning it would reach all trading in the *East Indies*, for the purpose of sending goods to other parts of the world, contrary to the provisions of the charter of the *East India* company (a).

Rule absolute for the defendant's discharge.

(a) [See *Lightfoot & al. v. Tenant*, 1 Bsf. & Pull. 551. as to the nature and effect of the provisions of this act.]

TRELAWNEY v. THOMAS.

Saturday,
Nov. 28th.

ASSUMPSIT for work and labour with the common money counts.

The action was brought for services performed and money advanced by the plaintiff at the request of the defendant, in support of Messrs. *Cruger* and *Peach*, two of the candidates at the last election of members of Parliament for the city of *Bristol*.

The cause was twice tried, and on each trial the plaintiff recovered a verdict; on the latter, for the amount of the money advanced by him for the purposes of the election, viz. 44 *l.* with interest, together with a certain sum for his attendance. The substance of the evidence on the part of the plaintiff, as it appeared on Lord *Loughborough's* statement of it, was, that the defendant, who was a member of the committee at *Bristol*, for carrying on the election in favour of *Peach* and *Cruger*, had taken upon himself an active part, in engaging the plaintiff to advance money, and attend in collecting the voters resident in *London*, and conveying them to *Bristol*. On the other hand, the defendant endeavoured to prove that he acted merely as the agent of *Peach* and by his authority; for which purpose he called, besides other evidence, two witnesses, *Lediard* and *Ewbank*; but they being examined on a *voir dire*, *Ewbank* said he had given a bond to

A. having given a general bond to *B.* for the payment of money, which, it is understood between them, is to be applied towards indemnifying *B.* from the expences of an election in which *B.* is a candidate; in an action brought by *C.* against *D.* for money advanced and services performed in supporting the interest of *B.* at the request of *D.* *A.* is not a competent witness. In assumpsit for work and labour,

Peach

1789.

TRELAW-
NEY
v.
THOMAS.

Peach for the payment of a sum of money, which it was understood between them, was to be applied towards indemnifying him from the expences of the election; and *Lediard* acknowledged that he had entered into a written agreement to the same effect. From this account, Lord *Loughborough* thought they were interested in the event of the cause, inasmuch as by procuring the plaintiff to be nonsuited or a verdict against him, they would save themselves from the consequences of this action, since if he gained a verdict, as the defendant would call upon *Peach* to be reimbursed the damages and costs, they would be liable by their engagements to *Peach*; and if the plaintiff having failed in this action should bring another against *Peach*, they (the witnesses) might tender to *Peach* the amount of the plaintiff's demand, and thereby escape the costs, for if *Peach* should proceed against them on their securities, he would be restrained in equity, from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered.

A rule was obtained by *Watson*, Serjt. to shew cause why there should not be a new trial on the following grounds: That the defendant was merely the agent of *Peach*, and therefore not personally liable: that the evidence of *Lediard* and *Ewbank* ought to have been admitted, and that the jury ought not to have calculated interest, the damages in an action for work and labour being before verdict unliquidated.

Adair, Serjt. who shewed cause, chiefly relied on two points. 1. That it was an established rule of law, too clear to be disputed, that though the principal was in general responsible for the acts of his agent, yet the agent might, by special circumstances, make himself liable; that it was the province of the jury to determine on the evidence, whether there were such circumstances or not; and that in the present case, it was found by the verdict that the defendant had conducted himself so as to be personally liable. 2. That it sufficiently appeared from the examination of *Lediard* and *Ewbank*, that they were interested in such a manner in the event of the cause as to make their evidence inadmissible.

The court delivered their opinions as follow:

GOULD, J.—It would be an exceedingly hard case, if the plaintiff *Trelawney* was not intitled to recover against the defendant *Thomas*, considering from the state of the evidence, the active share and part which he took in this business. For my own
part, .

part, if I had been present on the spot, and observed his conduct, I should have looked upon him as a person supporting the credit of *Cruger*, and putting himself forward as a stake to be responsible to every body. With respect to the committee, it is clear that *Thomas* was a member of it, and supposing the money to come from that committee, and having said nothing to give the plaintiff a better right against any other person, he shall not be permitted to turn the plaintiff round. With respect to the objection to the witnesses, I take it, that unless a witness is interested in the event of a cause, the objection will not go to repel him; it will not go to his competency, but only to his credit. In this case, it seems to me from the statement of it by my Lord Chief Justice, that there was an interest in these two witnesses, as they were liable to that sum of money which would follow a verdict in point of costs: they appear therefore, to me, interested to procure a nonsuit if they possibly could for the plaintiff, or a verdict against him. As to the last question, relating to the interest on the money, I remember a (a) case extremely well, where on a writ of inquiry, the jury on assessing damages, found interest for money lent; my brother *Whitaker* applied to set aside that inquisition, on the ground that the giving interest was not warranted by any precedent: a case was then cited from *Bunbury's Reports* (b), in which the court were of opinion, that for money lent, interest should be recovered; and *Whitaker's* motion was refused. Now money laid out for the use of another, and money lent to him, seem to stand precisely on the same ground with respect to reason, justice, and equity. As far, therefore, as interest was assessed with respect to the liquidated sum, I think the verdict perfectly right, and ought to be sustained: as to the sum for day's wages, certainly, in my apprehension, no interest ought to be allowed; and this distinction is made in the case in *Bunbury*, that for goods sold and delivered, or work and labour, no interest ought to be allowed; otherwise of money lent. But there is a known and usual method of remitting damages of this kind. I am therefore of opinion that there ought not to be a new trial.

[It was then stated at the bar, that no interest had been allowed on the sum for the daily attendance of the plaintiff; which the court said was perfectly right.]

HEATH, J.—I am of the same opinion with my brother *Gould*, on the first point. I think it clear that *Thomas* has made him-

(a) 2 *Black.* 761. 3 *Will.* 205.

(b) *Bunb.* 219.

1789. self liable; he was one of the acting committee, and the only person the plaintiff can sue. As to the question concerning the witnesses who were examined on the *voir dire*, one says he has entered into a written agreement, the other that he gave a bond for the payment of money; and one says the money was to be made use of in defraying the expences of the election. If the party were sued on the bond, though in point of law perhaps it could not be pleaded that only such a sum was really advanced, yet in equity no more would be recovered. Then the question is, Whether they are interested in the event of this suit? Now it appears clearly, that *Cruger* and *Peach* were joint candidates; it also appears that there was a committee formed for the interest of both, and that the defendant *Thomas* was a member of that committee. When therefore the two witnesses were called to be examined, and to nonsuit the plaintiff, who brings his action to recover the expences of the election, they speak most materially in respect to their own interest; because the money to be recovered by this verdict, will be part of the money for the securing payment of which, the agreement was entered into, and the bond was given.

TRELLAW-
NEY
v.
THOMAS.

WILSON, J.—With respect to the first question, it is evident that the jury might have found either way; there being evidence on both sides, they might very well find for the plaintiff, which they have done. With respect to the other question of the two witnesses, I entertain very great doubts. I am not prepared to go the length of saying their testimony ought to be rejected. All that one of them says is, that he gave a bond to Mr. *Peach* conditioned for the payment of money, and that he understood *Peach* was to apply it to defray the expences of the election. Now it does not at all appear that *Peach* would be answerable to the defendant *Thomas*, because if the committee undertook the election at their own expence by their own subscription, the candidate was not answerable to them; and if they were merely agents, they were not themselves personally answerable. There is no evidence therefore that *Thomas* could have compelled this money from *Peach*; and unless that was clearly established, I am of opinion that there is not a shadow of interest in the witness *Ewbank*. With regard to *Lediard*, I should also doubt, whether he had an interest in this case, which must be shewn, though they might have a common cause. Yet even if the objection were to hold, it would go only to the credit of the witnesses. Now these persons are not to pay over to the defendant
either

either the damages or costs of suit which he might incur; but there is a chance that *Peach* may call upon them. It is also very likely that *Lediard* might be mistaken; when he was giving an account of a written engagement, he might not recollect exactly what it was, it might be a bond having some recitals in it, or something relating to the election; but we do not know what it was. But I think it is too much to reject the evidence of witnesses, unless there is a positive and direct proof either out of their own mouths, or by record, (but out of their mouths, it should be,) that they are interested in the event of the cause. In the present case it ought to be shewn, that *Thomas* was employed by *Peach*, and that *Peach* was liable to him, when he made himself liable for the money.

1789.

TRELAW-
NEY
v.
THOMAS.

GOULD, J.—I remember a case in (*a*) *Strange*, where the witness answered to the *voir dire*, that though he was not under any legal obligation to bear out the costs, yet he considered himself under an obligation in point of honour, and that repelled him.

LORD LOUGHBOROUGH.—In this case there was no evidence at all, of there being any committee who had money of their own contributing to pay towards the expence of the election; on the contrary, the evidence on the part of the defendant proved the negative of that proposition. There was a committee managing the election for the absent candidate Mr. *Cruger*, and Mr. *Peach* one of the candidates has an engagement on the part of Mr. *Ewbank* to pay simply a sum of money; but *Ewbank* declares that the consideration on which he had given that bond, and what would make the real debt between *Peach* and him, was the application of so much of that sum as should be necessary towards the expences of the election, in relief of *Peach* the partner of *Cruger*. The other witness, *Lediard*, entered into an agreement which he states to be exactly of the same effect, for the payment of money which he understood to be for the expence of the election. Now they seem to me to have the most direct interest in the event of the cause: not that the verdict could be evidence on which the money would be demandable of them, but in the persuasion of their own minds, that the difference of the cause was just so much to them in the proportion of the costs. It is certainly sufficient, from the case in *Strange*, that the witness think himself interested, though in point of law there could be no recovery against him. Now if he dis-

(a) *Fotheringham v. Greenwood*, *Str.*, 129.

1787. closes the nature of his interest, and honestly says what that interest is according to his own conception of it, and it is an interest which by immediate and necessary consequence must subject him to the costs in the action, it would be strange to say that it was indifferent to him whether the defendant or plaintiff recovered. Certainly, in point of law, these witnesses must pay the money due on their agreements; but it is equally certain that *Peach* could have execution for no more than he could state to be paid by him for the expence of the election. The 44*l.* due to the plaintiff *Trelawney* is money advanced towards the expence of the election. In case he recovers, the obligation to pay the 44*l.* and all the costs of this and the other action, attaches, which in that respect become part of the expences of the election. If the plaintiff had been nonsuited, they might have tendered the two sums to *Peach* and thrown on him the costs. With regard to the question, How far collateral interest in the same cause will affect the parties so as to reject their evidence? I am at a loss for a settled and known rule. The cases have differed very widely upon it; it has appeared in several cases, that where the witness has stood precisely in the situation as either party to the cause, with respect to another action, it was better to hold it to be an objection that went to his competency rather than his credit. But I know that opinion is combated by very great authority. Yet it was so ruled in the time of Lord Chief Justice *Parker*, by all the Judges of *England*. The case is in *Fortescue*, 246. *Lock v. Hayton*, where an action was brought on a policy of insurance, and the plaintiff having proved the policy and premium, the master of the ship was called to prove the loss and damages, who admitted that he himself made an insurance on some goods of his own on board; an objection was taken to his competency, which the Chief Justice reserved for the consideration of the court; and afterwards on a communication with all the Judges, it is stated by *Fortescue*, who was himself a judge at that time, to be their unanimous opinion, that it was a sufficient objection to repel the witness. But this in the present case goes beside the point: as I take it here, there was a direct interest in the costs of the cause.

Rule discharged (a).

(a) See *Walton v. Shelly*, 1 Term Rep. B. R. 296.—(1) *Bent v. Baker*, 3 Term Rep. B. R. 27.

(1) [But see also *Jordaine v. Lustbrooke*, 7 Term Rep. B. R. 601.]

THE END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1790.

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Thirtieth Year of the Reign of GEORGE III.

KIRKMAN v. PRICE.

Monday,
Jan. 25th.

A RULE had been obtained to shew cause why a bond, warrant of attorney, and deed of assignment of the defendant's pay as a lieutenant in the navy, to secure an annuity, should not be given up to be cancelled, on the ground that the consideration of the annuity was not sufficiently set forth in the memorial according to 17 Geo. 3. c. 26.

The memorial stated generally the annuity to have been granted in consideration of 160 *l.* paid by the plaintiff to the defendant; but it appeared upon affidavit, that 99 *l.* 14*s.* 6*d.* of the money had been previously lent by the plaintiff, for which the defendant gave several promissory notes, and that the plaintiff at the time of granting the annuity, advanced only so much money as remained to complete the 160 *l.* allowing twelve guineas for the expences of the deeds (a), but gave up the notes.

This, *Bond*, Serjt. in shewing cause said, was sufficient, as the whole consideration money had in fact been received by the defendant, though at different times. He also said that the application came too early, since the statute did not give the court authority to interfere before execution was sued out on a judgment entered, or an action was brought.

The memorial of an annuity must set forth precisely the manner in which the consideration money was paid; according to 17 Geo 3. c. 26. *Q^u.* Whether the consideration were a good one which consisted partly of money paid at the time, and partly of securities for money before advanced, then given up?

(a) [See *Morgan v. Leake*, 8 Term Rep. B. R. 412.]

1790. *Adair*, Serjt. supported the rule, by contending that neither the consideration was a good one, nor the mode of advancing it so clearly set forth as the statute required. As to the first point, he cited *Jaques v. Withy*, 2 Term Rep. B. R. 557; as to the second, (on which he principally relied,) *Rumball v. Murray*, 3 Term Rep. B. R. 298.

KIRKMAN
v.
PRICE.

The court gave no decided opinion on the validity of the consideration (a), but held clearly, that the particulars of it were not sufficiently specified, the words of the statute being (b), that the consideration should be “fully and truly set forth and described” and therefore made the

Rule absolute.

(a) [That such a consideration is valid, B. R. 287. and *Krife v. Ambrosse*, 7 Term Rep. *Ex parte Fallon & Ux.* 5 Term Rep. B. R. 551.]

(b) Sect. 3.

Wednesday,
February 3d.

LOCKWOOD v. HILL.

A variance between the writ and count, (the *ac etiam* being in case on promises, but the declaration in debt) is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l.*

IN this case, on the motion of *Cockell*, Serjt. a rule was granted to shew cause why an *exoneretur* should not be entered on the recognizance of bail, on the ground that in the *capias ad resp.* against the principal, the *ac etiam* was “in a certain plea of “trespass on the case *on promises*” for 25 *l.* but that the declaration was in debt for 260 *l.* on simple contract.

Marshall, Serjt. shewed cause, arguing, that as the sum sworn to was under 40 *l.* the defendant might have been arrested and holden to bail on a common *clausum fregit* without an *ac etiam*. The stat. 13 Car. 2. st. 2. c. 2. which requires the cause of action to be expressed in the writ, and which gave rise to the clause of *ac etiam*, operates only where the sum is above 40 *l.*; when therefore the debt is under 40 *l.* the *ac etiam* is not necessary, and a difference between that and the count is not material, particularly as relating to the bail, who engage to be answerable for the debt of the defendant. *Prac. Reg.* 137.

The court were of this opinion, and the

Rule was discharged.

1790.

ZOUCH on the Demise of *WARD v. WILLINGALE*.

IN this ejectment, tried before the Lord Chief Baron at the last assizes at *Chelmsford*, the plaintiff was nonsuited on the following circumstances: In *September* 1787, the lessor of the plaintiff purchased the premises in fee, then occupied by the defendant who continued the tenant from year to year, and to whom the lessor of the plaintiff on the 19th of *March* 1788, gave the following notice to quit: "I do hereby give you notice to quit and leave the possession of all that messuage or tenement, &c. which you hold under me, &c. at *Michaelmas* day next," &c. The defendant not having quitted possession in pursuance of the notice, on the 24th of *February* 1789, the lessor of the plaintiff distrained for a year and a quarter's rent, due at *Christmas* 1788, viz. for the year ending at the expiration of the notice to quit, and the quarter from that time to *Christmas*, during which the defendant held over. The demise was laid on the 1st of *January* 1789, and the question was, as appeared from the Chief Baron's report, Whether the distress taken for rent accrued subsequent to the time when the defendant had notice to quit, was not a waiver of the notice?

Friday,
Feb. 5th.
A distress
taken for
rent accrued
after the ex-
piration of a
notice to
quit, is a
waiver of the
notice.

His Lordship was of opinion that it was a waiver, and therefore directed a nonsuit.

A rule having been obtained to shew cause, why the nonsuit should not be set aside, and a verdict entered for the plaintiff or a new trial granted;

Bond, Serjt. now shewed cause. The lessor of the plaintiff could not recover in this ejectment, having by the taking a distress affirmed and continued the tenancy, which he had before admitted by the terms of the notice. Though in *Doe v. Batten*, *Cowp.* 243. the mere acceptance of rent was holden not to be of itself a waiver of the notice, but to be a question for the jury, Whether it was the intention of the parties that such acceptance should be a waiver or not? yet in the present case no such question could arise, the distress being a direct acknowledgment that the tenancy continued. This principle is to be collected from *Co. Lit.* 212. b.—1 *Roll. Abr.* 475.—3 *Co.* 64. *Pennant's Case*. *Plowd.* 133. which cites 14 *Assize*.—*Birch v. Wright*, 1 *Term Rep. B. R.* 378.

Runnington, Serjt. *contra*. As the defendant was tenant from year to year, the authorities cited from *Lord Coke*, which were

1790.

ZOUCH
v.
WILLIN-
GALL.

of the waiver of a forfeiture for a condition broken, are not applicable. As the landlord might have brought an action for use and occupation, there is no good reason why he may not also bring an ejectment. In the former, there is an implied contract between the parties, founded on a supposed permission by the plaintiff for the defendant to enjoy; in the latter the contract is express, but the principle is the same. In *Doe v. Batten* acceptance of rent was holden not to be a waiver of a notice to quit, and in a case there cited, tried at *Launceston* assizes, though the plaintiff had accepted rent which had accrued after the demise, yet he both recovered in the ejectment, and afterwards in an action for use and occupation.

LORD LOUGHBOROUGH.—There could be no question of intention left to the jury, as the taking a distress was an act not to be qualified, and an express confirmation of the tenancy.

GOULD, J.—In the mere acceptance of rent, the *quo animo* is to be left to the jury agreeable to Lord *Mansfield's* doctrine in the case in *Cowper* (a). But I agree with my Lord Chief Justice, that the distress was in this case an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J.—I am of the same opinion. In *Doe v. Batten* there was a design to deceive the landlord, and a question I remember very well was made, Whether he should be bound by the terms of the receipt, in which the money was called rent for that direct purpose? which was the ground of Lord *Mansfield's* saying, that the question *quo animo* should be left to the jury. The mere acceptance of money is equivocal, it may be in satisfaction for a trespass, or it may be for rent: and in an action of trespass for mesne profits, accord and satisfaction may be pleaded in bar if rent has been accepted. There would be no doubt, but that the plaintiff would not have been precluded by taking a distress, if instead of the year and a quarter, it had been only for rent due at *Michaelmas*, because the statute (b) says, that a distress may be taken within six months after the determination of a lease, provided the interest of the landlord, and the possession of the tenant continue; the law in this respect being altered since the time of Lord *Coke*, when the old notion prevailed, that a distress could not be taken, unless the same relation subsisted between the parties.

Rule discharged.

(a) [See *Goodright d. Charter v. Cord-* rent), accrued due after the expiration of a
went, E. 35 G. 3. 6 Term Rep. B. R. 219. | notice to quit, it is an absolute waiver of
that if a landlord receive rent (eo nomine as | that notice.]

(b) 3 Anne, c. 14. s. 6 & 7.

1790.

COLLIS and Others v. EMETT.

Friday,
Feb. 12th.

INDORSEES against the drawer of a bill of exchange. The declaration contained six counts. 1. Stating, that the plaintiffs and defendant, and certain persons using the name, stile and firm of *Livesay, Hargreave, Ansie, Smith, and Hall*, were persons respectively trading and using commerce, &c.; that the said persons so using the names, stile and firm of *Livesay and Co.* were partners: that the defendant on the 5th of *April 1788*, drew a bill of exchange directed to them, by which he required them, three months after date, to pay to *Mr. George Chapman or order*, 1,551 l. value received, and delivered the said bill to them, and authorized them to negotiate and indorse the same in the name of *George Chapman*, and thereby to raise money thereon for the use of the said persons so using the names, stile and firm of *Livesay and Co.* The plaintiffs then averred, that when the said bill was so made as aforesaid, or at any time afterwards, *there was no such person as George Chapman the supposed payee* in the said bill of exchange, but that *the said name was merely fictitious*, to wit, at *London, &c.* which said bill of exchange, afterwards, to wit, &c. by one *Andrew Goodrick* being a person thereunto in that behalf lawfully authorized by *Livesay and Co.* upon sight thereof was accepted according to the usage and custom aforesaid. And the said persons so using the names, &c. of *Livesay and Co.* being so authorized as aforesaid, afterwards and before the payment of the said sum of money therein contained or any part thereof, and before the time thereby appointed for such payment, to wit, &c. negotiated and indorsed the said bill of exchange in and with the name of the said *George Chapman*, and by that indorsement in the name of the said *George Chapman*, appointed the contents of the said bill of exchange to be paid to the said plaintiffs, and thereby raised money thereon for the use of the said persons so using the names, &c. of *Livesay and Co.* and then and there delivered the said bill of exchange so indorsed to the said plaintiffs, who thereupon, then and there on the credit thereof, advanced to the said persons so using the names, stile and firm of *Livesay and Co.* the said

A. having signed his name to a blank paper duly stamped, and delivered it to *B.* for the purpose of drawing a bill of exchange in such manner as *B.* should think fit, *B.* draws a bill payable to a fictitious payee or order, and indorses it over for a valuable consideration to *C.* who is ignorant of the transaction, *C.* the indorsee may maintain an action against *A.* as the drawer of a bill payable to bearer, on a count to that effect. Or, *C.* may recover, on a count stating the special circumstances of the case, if that count do not vary from the verdict (a):

(a) [See note at the end of this case, p. 321.]

sum

1790. sum of money in the said bill mentioned; of which the defendant, &c. had notice. It was then stated that the bill was afterwards presented to the persons using the names, &c. of *Livesay*, &c. for payment, which was refused by them, of which the defendant had notice, by reason whereof he became liable, &c. and being so liable promised to pay, &c. &c.

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2d Count, leaving out the special circumstances, stated the bill to be drawn by the defendant on the said persons using the names, &c. of *Livesay*, &c. who were thereby requested to pay to *Mr. George Chapman or bearer* 1,551 l. &c. and the plaintiffs averred that *they were and still continued the bearers and proprietors* of the said last-mentioned bill of exchange in due form of law, and so being the bearers and proprietors, &c. presented it to the said persons using the names, &c. of *Livesay*, &c. for payment—their refusal to pay—notice to the defendant—he became liable—promise, &c.

3. Money paid.—4. Money lent.—5. Money had and received.—6. *In simul computassent*.

Plea, general issue.—The cause was tried before Lord *Loughborough* at *Guildhall*, and the following special verdict found :

That the said *John Emmet* (who was a partner with *Livesay* and *Co.* in the spinning of cotton at *Clishero*) wrote his name upon a piece of blank paper, with a shilling stamp thereon, and delivered the same to *Livesay* and *Co.* for the purpose of drawing a bill of exchange for such sum, payable at such time, and to such person or persons as they should think fit.

That afterwards the said *Livesay* and *Co.* on the 5th day of *April* 1788, drew on the said paper above the name of the said *John Emmet*, a certain writing directed to the said *Livesay* and *Co.* in the words and figures following, viz. “*Clishero, April 5th, 1788, £. 1,551, three months after date, pay to Mr. George Chapman or order, fifteen hundred and fifty pounds, value received as advised, John Emmet.*” That the occasion and manner of giving the said paper writing was as follows, viz. That on the said 5th of *April* the said *Livesay* and *Co.* were indebted to *Thomas Jeffery*, in the sum of 1,512 l. 9 s. upon a bill of exchange which became due that day, and which had been previously given for goods sold by *Jeffery* to them. That one *Richard Collis*, clerk to the said *Jeffery*, on that day applied at the house of *Livesay* and *Co.* in

in *Cheapside*, for payment of the said bill ; that on such application, he saw the said *Anstie*, one of the said partners, who informed the said *Richard Collis* that he could not conveniently then pay the same, but requested the said *Richard Collis* to take a bill on the said house of *Livesay and Co.* for the said sum of 1,512 l. 9 s. at three months' date, including the interest thereof in the mean time, and gave to him the said *blank paper* above mentioned, with the name of the said *John Emmet* written thereon, to be filled up by one of the clerks of the said *Livesay and Co.*

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That one *Ludlow*, a clerk of the said *Livesay and Co.* filled up the said writing for 1,551 l. being the amount of the said bill, and interest, in manner and form as above set forth, except the acceptance and indorsement thereof as herein-after mentioned ; and that immediately afterwards, the said paper writing was carried to *Andrew Goodrick*, another clerk of the said *Livesay and Co.* and who was authorised by the said *Livesay and Co.* to accept the same, and which the said *Andrew Goodrick* accordingly did, in the name of the said *Livesay and Co.* That with the authority of the said *Livesay and Co.* the name of *George Chapman* was then indorsed in the said paper writing, and that the said paper writing so filled up, accepted, and indorsed, was then delivered to the said *Richard Collis*, and the said *Richard Collis* thereupon delivered up the bill for 1,512 l. 9 s. to the said *Livesay and Co.* That the said *Thomas Jeffery* afterwards negotiated the said paper writing with the plaintiffs, and received the full amount thereof from them deducting a discount at $4\frac{1}{2}$ l. per cent. and delivered the same to the said plaintiffs. That the same was duly presented for payment, to the said *Livesay and Co.* who refused to pay the same, whereof the said *John Emmet* had due notice.—That there was no such person as the said *George Chapman*, the supposed payee of the said paper writing, but that the said *George Chapman* was merely a fictitious person : that *Emmet* gave no further, or other authority than as aforesaid, and knew nothing of this transaction. That the plaintiffs had then no knowledge that the said *George Chapman* was a fictitious person, or of the circumstances under which the said paper writing was drawn, accepted, and indorsed, but that the said *Thomas Jeffery* had full knowledge of the whole of the said transactions.

This was argued in *Trinity* term last by *Lawrence*, Serjt. for the plaintiffs, and *Runnington*, Serjt. for the defendant ; and a

1790. second time in *Michaelmas* term, by *Adair*, Serjt. for the plaintiffs, and *Cockell*, Serjt. for the defendant. The following is the substance of the arguments on behalf of the plaintiffs:

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On the face of the special verdict, there are facts sufficient to support the finding of the jury on either of the counts. The defendant having written his name on a blank paper, and given it to *Livesay* and *Co.* to be filled up as a negotiable instrument, gave them authority to pledge his credit to any amount, and was in law as completely the drawer of the bill as if he had made it in its present form: having used a shilling stamp, it is evident that he meant to offer his credit unlimited. He is therefore civilly responsible for all the purposes to which *Livesay* and *Co.* might apply the bill. Their acts must in law be considered as his. In the case of (*a*) *Stone v. Freeland*, Lord *Mansfield* held, that the acceptor was liable though there was a fictitious indorsement, and that he should not be suffered to deny the validity of the bill: so also in (*b*) *Russell v. Langstaffe*, Lord *Mansfield*'s words may be applied to the present case; the defendant here said to the plaintiffs "trust *Livesay* and *Co.* to any amount, and I will be their security." But it has been objected, that there is both a general principle of law, and a rule of practice, that the hand-writing of the first indorser must be proved, as a medium through which the holder must make out his title. But this is not universally true to the extent, that no one can recover without proof of the indorsement, since in some cases such an indorsement is not necessary, and in others

(*a*) *STONE v. FREELAND*, B. R. Sittings at *Guildhall*, after *Easter* term 1769.

Indorse against the acceptor of a bill of exchange, payable to *Butler* and *Co.* and indorsed in that name. The plaintiff could not prove it to have been indorsed by any persons using that firm; on the contrary, his own witnesses said they believed it was indorsed by *Cox* the drawer. It also appeared that there was a house of *Butler* and *Co.* with whom *Cox* had dealings, but it was proved that the bill in question had never been in their hands. It was admitted that the bill was a true one, and that the defendant had regularly accepted it, but it was contended that the indorsement was fictitious, which was an essential part of the plaintiff's title.

Lord *Mansfield*.—The intent of the bill was only to enable *Cox* to raise money, and the reason why it was not made payable to the order of *Cox* was, that there were other bills at that time made payable to his order; if this had been also payable to the same order, too many would have been in circulation at the same time, in the same name, which would have had the appearance of fictitious credit. Names are often used of persons who never existed. The defendant has enabled *Cox* to do this by lending his acceptance, and when he has by so doing put the bill in circulation, it shall not lie in his mouth to make an objection that he has nothing to do with it.

Verdict for the plaintiff.

(*b*) *Dougl.* 496.

where

where the form seemed to require it, it has been dispensed with. Though it is true, that in many cases where proof of the indorsement was not necessary, a verdict has been taken on the general money counts, and the paper instrument merely received as evidence, yet it has been decided both before and since the *stat.*

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3 & 4 *Anne*, c. 9. that a *bonâ fide* holder of a bill might recover upon it as a bill, without proving the indorsement. 2 *Shower*, 235. *Hinton's Case*, and 3 *Burr*. 1516, *Grant v. Vaughan*, from which latter case it may clearly be collected, that an indorsement is not indispensably necessary to give negotiability to a bill or note, but that a *bonâ fide* holder may recover without it. Yet it is said, that as this bill is drawn payable to *George Chapman or order*, it necessarily requires an indorsement. But this rule is not universally true. *Hankey v. Wilson, Sayer*, 223. where proof of the hand-writing of the indorser was dispensed with, because it was on the bill at the time of the acceptance: which proves that the rule admits of exceptions. So also is the case of (a) *Pratt v. Howison*; and though this doctrine may seem to be over-ruled by *Smith v. Chester*, 1 *Term Rep. B. R.* 654. yet that case can only govern those which are of the same kind. There the action was against the acceptor, here against the drawer. The reason on which that case is founded, can alone be applicable, where the acceptor is sued; which is, that the acceptor admits only the hand-writing of the drawer, (though at the time of the acceptance, there be several indorsements on the bill,) and shall put the plaintiff on proving the hand-writing of the first indorser: the obvious meaning of which is, that though there is a privity implied between the drawer and acceptor, there is not between the indorser and acceptor. But there is a privity between the drawer and the payee of a bill, which is supposed to be given for a valuable consideration. If the jury had found the whole bill to have been in the hand-writing of *Emett*, would it have been necessary to prove that *George Chapman* really indorsed it? *Emett* himself could not have objected, that there was no such person, and on that objection nonsuited the plaintiff. This case then is clearly distinguishable from that of *Smith v. Chester*, which does not affect it. Besides, it is expressly stated in the declaration that there was no such person as *George Chapman*, the defendant therefore shall not take advantage of this fictitious name, invented by those to

(a) *Guildhall sitting*; after *Trin. 23 Geo. 3.* cited 1 *Term Rep. B. R.* 654.

whom

1790. whom he gave unlimited credit, and deprive the *bond fide* holder of his remedy.

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As the rule then, requiring the hand-writing of the first indorser to be proved, admits of some exceptions, the present is as strong an exception as can well be imagined. Suppose it had been impossible to prove it, on account of some act of the party himself; the next best proof would be admitted. In general, bonds and other deeds can only be proved by the subscribing witnesses; but there are exceptions to that rule; and one is, where the party himself has rendered such proof impracticable or very difficult. On the facts contained in the first count, therefore, the plaintiff is intitled to recover; but if this should be doubted, he clearly is on the second, in which the bill is stated to have been drawn payable to *George Chapman* or bearer. For if a bill be made payable to a person, who not having an actual existence can make no indorsement, it operates in law as payable to the bearer; particularly when given for a valuable consideration. *Vere v. Lewis*, 3 Term Rep. B. R. 182. (a) The action is also maintainable on the count for money lent. Money advanced on the credit of any man is in law money lent and advanced to him. *Tatlock v. Harris*, 3 Term Rep. B. R. 174.

But supposing the addition of a fictitious name to be felony, the answer to the defendant's objection that a felony cannot be the ground of a civil action, is, that though it cannot be the immediate ground of such an action, yet it may be so mediately. *Miller v. Race*, 1 Burr. 452. *Peacock v. Rhodes*, Dougl. 633.

The following were the arguments on behalf of the defendant. There is a variance in several material points between the special verdict and the declaration. The first count states that the defendant "drew a bill of exchange directed to *Livesay and Co.* payable to *George Chapman* or order, and delivered and authorised them to negotiate it, and thereby to raise money thereon," &c. This is a substantive allegation, which ought to have been proved as laid; but it is negatived by the verdict; it being found that the defendant wrote his name upon a piece of blank paper, with a shilling stamp thereon, and delivered the same to *Livesay and Co.* for the purpose of drawing a bill of exchange for such sum, payable at such time, and to such person or persons as they should think fit. It is likewise stated in the first count, that the plaintiffs "advanced to *Livesay and Co.* the money

(a) See also *Minet v. Gilson*, *ibid.* 481.

" mentioned

“ mentioned in the bill, &c. ; but it appears on the verdict that
 “ *Thomas Jeffery* negotiated the paper writing with the plaintiffs,
 “ and that he received from them the amount of it,” &c. .

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Admitting that the defendant has given an unlimited credit, by signing his name to a blank paper, yet there was nothing criminal in this ; the verdict shews that he was not guilty of a forgery, nor was concerned in filling up the paper. Though he gave unlimited credit, yet it was by means of a legal instrument ; he stands in the situation of a common drawer of a bill, in an action against whom, the hand-writing of the first indorser is necessary to be proved. As to the argument, that it is the same case as if the defendant had drawn the whole bill with his own hand, and himself indorsed the name of *Chapman* ; if he had done so he would have committed a forgery, and this being a felony could not have been the ground of a civil action. As to *Hinton's* case, it proves only that the consideration of a bill or note must be proved. In *Grant v. Vaughan*, the bill was payable to the ship *Fortune*, an inanimate thing, or bearer, on the face of it therefore it could only operate as payable to bearer ; and the intent of the parties was sufficiently plain. In *Stone v. Freeland*, there was a special undertaking by the acceptor, who had admitted effects in his hands. In *Russel v. Langstaffe*, a blank promissory note was given with an actual indorsement by *Langstaffe* ; there was no fictitious person introduced ; that case therefore is not applicable to the present. In *Hankey v. Wilson*, the court coupled an express promise to pay with the indorsement, yet that was not deemed conclusive evidence ; but the general rule is there admitted, that the hand-writing of the first indorser must be proved. In *Miller v. Race*, and *Peacock v. Rhodes*, the felony was exclusive and independent of the bill. But in the present case there is a forgery inherent in the bill itself. It is drawn in the usual form, made payable to order, and being so payable requires an indorsement ; but that indorsement is forged. Yet as it is found that the defendant did not himself forge it, nor was privy to it, he is not estopped from alleging it in his defence. If the words “ or “ order ” be rejected, and the bill be considered as payable to bearer, any other part may as well be rejected, which could not be endured. The court cannot say that a bill which is evidently payable to order, is payable to bearer : they cannot change the nature of a mercantile transaction contrary to the express intent of the parties : they cannot put a construction on the instrument directly repugnant to it. But though as the bill in question is payable

1790. payable to *Chapman* or order, the form is preserved so far as to prevent it from being considered as payable to bearer, yet one of the essential constituent parts of a bill of exchange is wanting, viz. a real payee. 2 *Blac. Com.* 456. *Poffleth. Dict. tit. Bills of Exch.* By this the whole was vitiated. So a bill given on an usurious consideration, is void even in the hands of an innocent indorsee for a valuable consideration, and without notice. *Dougl.* 709. So for money won at play. *Stra.* 1155. A bill of exchange must also be necessarily negotiable; but it cannot be negotiable without an indorsement; and a false indorsement is as none. The case of *Pratt v. Howison*, is over-ruled by *Smith v. Chester*. As to the argument, that there was a privity between the payee and drawer, it is expressly found by the verdict, that there was no privity between them in this instance. Then what is there to take this case out of the general rule? As to the argument that the defendant is in fact to be regarded as the maker of the bill, the jury have found it otherwise, namely, that the bill was filled up by other persons. Neither is the defendant liable on the money counts. That neither debt nor general *indebitatus assumpsit* will lie on the mere acceptance of a bill of exchange is clear from *Hardr.* 485. 1 *Vent.* 152. *Lord Raym.* 280. Much less against the drawer who is only eventually liable. The case relied on of *Tatlock v. Harris*, and *Vere v. Lewis*, were decided on their own particular circumstances, and on a presumption that money had been actually had and received to the use of the holders. Those cases were against acceptors, here it is against the drawer; there the defendants were privy to the transactions: and there was fraud within their own knowledge; here the defendant acted *bonâ fide*, was ignorant of the conduct of *Livesay and Co.* and does not appear to have really obtained any money.

Cur. vult advis.

On this day judgment was given, as follows, by

LORD LOUGHBOROUGH.—It is not necessary for me to repeat the evidence in this case, the facts of it being in the memory of every one. We have taken the whole into our consideration, and the result of our opinion is, that the plaintiff is intitled to recover. The special count in the declaration, stating the whole of the transaction, would have afforded a ground, upon which I should have thought that judgment might have been very properly pronounced in his favour. But it appears upon the record, that the case stated on the special count differs from the finding on the special verdict in two or three circumstances; that counts, therefore,

therefore, would clearly not support a judgment in favour of the plaintiff. The circumstances are not very material, but as the count and the verdict at present stand inconsistent with each other, a judgment for the plaintiff on the first count would undoubtedly be erroneous. We must therefore look into the declaration, to see if there be any count on the record, on which the plaintiff may support a judgment. And it appears to us that it may fairly be supported on the count, stating the bill to be a bill *payable to bearer*. It is certainly not *literatim* payable to bearer, it is drawn payable to *George Chapman* or order. Upon a fact set forth in the special verdict, it appears that by the permission at least, if not something more than the permission of the defendant, a power was given to *Livesay* and *Co.* to frame bills of exchange, binding him in any manner they thought proper, within the limits of that power. There is no doubt they might, within those limits have drawn a bill in terms payable to bearer; the bill they have chosen to draw is a bill payable to *Chapman* or order; and it is found on the verdict that there is no such person as *Chapman*. Now the consequence of this seems naturally and justly to be, that when a security is negotiated, on which, by the terms of it, the party receiving it apprehends he has a clear right to recover, and by the insertion of the name of a fictitious person, his recovery is impeded, (it being impossible to prove the order of a person who has no existence,) it should seem in point of law precisely the same in effect as if it had been made payable to bearer. A bill of exchange is an authority to pay pursuant to the order of the payee; and it is also an undertaking to pay pursuant to that order. But if there be no person who by any possibility can give such order, the engagement must be to pay the bill. If the order of the person cannot be procured, and with the knowledge and privity of the parties who make the bill, such a name is put in as cannot give an order, it is in effect, and in point of law, the same thing as if they had made it payable to the person who held the bill, namely the bearer. The determination of the court of *King's Bench* has approved the same rule, and we think that a right determination. Judgment for the plaintiff on the second count (a).

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(a) [This decision was never appealed from, but was relied upon by the counsel in argument; and by several of the judges in giving their opinion, in the House of Lords in the case of *Minet v. Gibson*. See post. p. 590. — 595. of this volume. See also the cases of *Tatlock v. Harris*, 3 Term Rep. B. R. 174; *Vere v. Lewis*, 3 Term Rep. B. R. 182; *Minet &*

al. v. Gibson & al. 3 Term Rep. B. R. 481; post. p. 563.—625. of this vol. and Parl. Cases, 8vo. ii. 48.—61. and *Gibson & al. v. Hunter*, post. vol. 2. p. 187.—211.—238. 298; Parl. Cases, 8vo. vi. 235. and the long note there. The result of all these cases appears to be, that "a bill of exchange payable to a fictitious payee or order, and indorsed in his name by concert between the

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"the drawer and acceptor, is to be considered as a bill payable to bearer, in an action by an innocent indorsee for a valuable consideration, either against the drawer or acceptor of the bill." But see *contra* the opinions of *Eyre, C. J. and Heath*; J. post. pages 598. 625. with whom the Lord Chancellor *Thurlow* coincided; see p. 625.]

PARSONS v. THOMPSON.

Friday,

Feb. 12th.

A. being possessed of an office in a dock-yard, *B.* in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees, (without the knowledge of the Navy-board to whom the appointment belongs,) in case *B.* should succeed him, to allow him a certain annual share of the profits of the office. *B.* is appointed, but does not perform the agreement. *A.* can maintain no action on the agreement.

ASSUMPSIT on a special agreement. The declaration stated that the plaintiff was possessed of the place or office of master joiner of his majesty's dock-yard at *Chatham*, and that in consideration that he would procure himself to be superannuated in respect of the said place or office, the defendant undertook, in case he (the defendant) should succeed the plaintiff to be master joiner of the dock-yard, at the commencement of his superannuation, to allow the plaintiff his *extra pay from the yard books*, exclusive of his superannuation money, during his natural life. It then stated that the plaintiff, confiding in the said promise of the defendant, did procure himself to be superannuated in respect of the said place or office, and that the defendant succeeded him as master joiner, at the commencement of his superannuation: that the defendant received divers large sums of money, amounting in the whole to 200 *l.* as and for the *extra pay* of the plaintiff; by reason whereof he became liable, &c. and being liable promised, &c. There were also the common counts. Plea, general issue. Verdict for the plaintiff, subject to the opinion of the court on a case which stated in substance, that the plaintiff was for 30 years master joiner of the dock-yard at *Chatham*, and the defendant foreman of the joiners. That the defendant having a prospect of succeeding to the office of master joiner, (which does not go in regular succession, but is in the appointment of the commissioners of the navy,) applied to the plaintiff to procure himself to be superannuated, which he did, on the following written agreement being entered into by the defendant:

"Agreed on the 29th day of *March* 1785, between Mr. *John Parsons*, master joiner of his majesty's dock-yard at *Chatham*, and *John Thompson* foreman of the joiners of the aforesaid place. In case I should succeed Mr *Parsons* to be master joiner of the said dock-yard, at the commencement of Mr. *Parsons's* superannuation, then I do agree to allow him his *extra pay from the yard-books exclusive of his superannuation money*, during his natural life, &c. " *John Thompson.*"

The

The superannuation money was an annual allowance from Government. 1790.

In 1785 the defendant was appointed to the office. The bare pay of the master joiner is half-a-crown *per* day, all above is *extrà* pay. There are two sorts of *extrà* pay, the *tide extrà*, (when the men work by the tide beyond the common yard hours,) and the *casual extrà* which includes other extraordinary work. It is all denominated *extrà* pay in the yard books without distinction. From 1785 to 1787, the defendant paid to the plaintiff the common *tide extrà*, at the rate of 7½*d.* *per* tide for the six winter months, and 1*s.* 3*d.* for double tides in the summer months, but not the *casual extrà*, which the plaintiff did not demand. In the summer of 1787 the *casual extrà* pay was much increased by the extraordinary work performed in fitting out ships on the prospect of an approaching war with the *Dutch*; this *casual extrà* pay so increased, the plaintiff claimed by virtue of the agreement, but the defendant refused to account for to him; and in consequence this action was brought.

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A rule having been granted to shew cause, why the verdict should be set aside and a nonsuit entered,

Lawrence, Serjt. shewed cause. In this case there are two questions. 1. Whether the agreement was valid; 2. Whether, if valid, it did not comprehend the *casual extrà*, as well as the *tide extrà* pay? As to the first, it is to be observed, that this is not an agreement for the sale of an office. The circumstances were, that the plaintiff having been a long time master joiner, was intitled to quit on being superannuated; the defendant being in hopes to succeed him, applied to him to quit, and, as a compensation, agreed to allow him the *extrà* wages. This was not a sale, because the person who gave up the office was not to appoint his successor. If money is given for the appointment to an office, it is undoubtedly bad at common law, and for the wisest reasons; because if that sort of traffic were permitted, offices of the greatest trust might come to the hands of persons who were wholly unfit for them. But no such mischievous consequences can ensue, for merely receiving a compensation where the party receiving it has no power to appoint a successor. In *Berrisford v. Done*, 1 *Vern.* 98. it was holden that where a bond was given to a captain in the army in consideration of his resigning his company, to which the obligor was in hopes of succeeding, the bond was valid. And in *Symonds v. Gibson*, 2 *Vern.* 308. bonds were allowed to be legal, entered into to procure the

1790. obligor's admission to be purser of a man of war ; which was a stronger case than that of money being given merely to induce a man to resign. The same doctrine is also recognized in *Jur v. Ash, Prac. Chanc.* 199. The agreement therefore in the present case was not illegal.

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The other question is, Whether all casual *extra* pay is not included in the agreement? The terms are, that the defendant shall allow the plaintiff his *extra* pay from the yard books; and the evidence proved that *extra* pay on the yard books is all *extra* pay: the defendant therefore was bound by his agreement to give to the plaintiff all the *extra* pay which he received.

Bond, Serjt. for the rule. The agreement was both contrary to the true policy of the law, and cannot be extended to any casual *extra* pay, which did not exist in the yard at the time of making it. It is a principle of law, that no man shall be appointed to an office, the emoluments of which are severed from it and he is not to receive. It is equally impolitic and illegal to give money to procure the vacancy of an office, as the appointment to it. The plaintiff having an annuity on account of his superannuation, had no right to receive any further profits from the office, unless by the consent of the commissioners of the navy to whom the appointment belonged. Here the persons who have the right of appointment are deceived. That the contract is bad, sufficiently appears from the doctrine of the Master of the Rolls in *Bellamy v. Burrow, Cas. Temp. Talbot*, 97. and *Law v. Law*, 3 P. Wms. 392.

[Lord LOUGHBOROUGH here said, he remembered a case where a bond was given to an agent as a consideration for procuring a commission in the army, and Lord Chancellor *Northington* held, that though it was the practice in the army to purchase, yet a bond given to procure a commission, was bad.]

That determination of Lord *Northington* affords an answer to the cases cited from *Vernon*, which were of military offices sold by consent of Government, which is in daily practice. When a commission in the army is sold, the seller only receives back what he had before given; but yet an officer must have a new permission to purchase on half-pay. As to the second question made on the other side, whatever may appear on the yard books, the agreement must be construed by the intent of the parties at the time of making it. But that could only relate to such *extra* pay as then existed. No casual and subsequent increase of profit ought in reason to be superadded.

Lawrence

Lawrence replied, that in *Bellamy v. Burrow*, notwithstanding the opinion of the Master of the Rolls, Lord *Talbot* ultimately decreed that *Burrow* was a trustee in the office for *Bellamy*. As to the case of *Law v. Law*, there money was actually given for procuring the office, which distinguishes it from the present case. The argument drawn from the supposed impropriety of severing the profits, from the possession of an office, might be equally applied, if it had any weight, to military offices; but it is the common practice of the army, for a person who buys a commission to give part of the profits to another. As to the casual profits being subsequent to the agreement, the plaintiff had himself received the casual profits before, and the defendant knew that such casual profits might again happen; the parties therefore to the agreement must have had them in contemplation.

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Cur. vult advis.

After consideration, judgment was this day given by

Lord LOUGHBOROUGH.—On the trial of this cause, two points were made, one, Whether the agreement was legal? the other, What was the meaning of *extra* pay? The second question is immaterial, if the first be against the plaintiff. But it is to be observed, that if the construction be as the plaintiff contends, that all which the defendant could receive as master joiner would be 2s. 6d. a-day, the objection to the validity of the agreement is still more apparent; because it would have this effect, that no exertion of the defendant for which *extra* pay would be due, would be beneficial to himself, which might produce public mischief. But taking the agreement on this point, in a restrictive sense, that it means a certain stated and fixed allowance, beyond 2s. 6d. a-day, understanding it to be a defined known share of perquisites, we are all of opinion that it does not afford a just cause of action. Every action on promises must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here? That the plaintiff represented himself as unfit for future service, and intitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the defendant; all

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he did was for his own ease and advantage. If false, the public is deceived, the pension misapplied, and the service injured. It is not stated that the plaintiff procured the appointment for the defendant, (which would clearly have been brokerage of office and bad,) but that he made way for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the Admiralty, judging of the ease, and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public: I say possibly only; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves, which cannot admit of any consideration sufficient to maintain an action. If it could be proved that it was to be measured by money so as to form a valuable consideration, it must be in respect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brokerage; it would differ very little in effect from selling the interest itself, though there would be a difference in the conduct of the party, who in the one case would be passive, in the other active. But this passive merit, if I may use the expression, would not avail him, where his active exertion would be a demerit. The case cited from 1 *Vern.* 98. I think may be supported. It was of the purchase of a commission in the army, which the *Duke of Ormond* refused to ratify, on the ground, that the plaintiff had bought without the other party having leave to sell, who had not bought. I should rather suspect, from the usual inaccuracy of the cases in *Vernon*, that the plaintiff got the commission by succession, and set up this defence against the payment of the bond. There is something very like it in the reasoning of the court, who held there was no relief against the bond. The question of the consideration did not occur to them; and they seem to have holden that where commissions were generally saleable, there was nothing unfair in such a transaction. The next case in 2 *Vern.* 308. if true, is a decision undoubtedly contrary to what we now decide, and I think contrary to an evident principle of law. On the state of the report, the bonds are directly and plainly given for brokerage of an office of trust and profit, which is not an object of sale. I have therefore no difficulty to say that I hold that case to be extremely ill determined, if the note of it be at all correct. The

case of *Ive v. Ash*, *Pres. Chan.* 199. I think rightly determined; there was a purchase of a commission allowed to be sold; the commission was given up, and the purchaser wanted to get rid of the bargain, and be free from the agreement. He objected that a commission in the marines could not be sold; but it turned out upon examination, that the sale of such commissions was permitted, not being looked upon as within the statute. I therefore hold that case to be well adjudged: for the question, Whether an office is saleable or not? is a matter of public regulation, and not a question for a court. If by public regulation right or wrong, certain offices are saleable, the court cannot set aside the transaction for their sale: the court is not to make the regulation. Whether by the general police of the country an individual office is saleable or not, is not a matter of law. But in the present case there is no ground to say, that the defendant's office was sold under any regulation, or that the transaction between the parties was carried on, under any authority, or with the consent of their superiors. This agreement resting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise, but legal obligations are, from their nature, more circumscribed than moral duties,

Judgment for the defendant (a).

(a) [See *Blachford & al. v. Preston*, 3 Term Rep. B.R. 89. where it was held that on a contract for the sale by the owner, of the command of a ship in the East India Company's service, without the knowledge and against the bye-laws of the Company, no action could be maintained. See also *Layng v. Paine*, *Willes's Rep.* 571. and Mr. Durnford's notes there.]

The following Case, with which I have been favoured, may not improperly be inserted in this place.

GARFORTH v. FEARON,

Mich. 27 Geo. 3.

Thursday,
Nov. 22,
1787.

THIS was an action of *assumpsit* for money had and received, brought by the direction of the Master of the Rolls, in consequence of a bill filed in equity by the plaintiff and his son, praying that the defendant might be declared a trustee of the office of *customer of Carlisle*, for the plaintiff, for the benefit of the plaintiff. *A.* by the interest, and on the application of *B.* is appointed customer of a port, having previously signed an agreement, declaring that his name was used in the application in trust for *B.* that he would appoint such deputies as *B.* should nominate, and would empower *B.* to receive the profits of the office to his own use. On the failure of *A.* to comply with the agreement no action upon it will lie against him.

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son (a). On the trial of the cause at the sittings in Trinity Term 1787, before Lord Loughborough, it appeared in evidence that application was made to the Lords of the Treasury by the friends of the plaintiff, to procure for the defendant the office of customer of the port of Carlisle. On the 25th of February 1773, the defendant signed the following declaration: "I do hereby declare, that my own name was made use of in trust for Mr. John Garforth, on the application made to the Lords of the Treasury for the office or place lately held by Mr. Grape deceased in the county of Cumberland; and I do hereby promise, in case any appointment has been or is made thereof, that I will upon request appoint such deputy or deputies as he shall nominate, and also empower the said Mr. Garforth to receive the salary, stipend, wages, and fees of the said office to his own use. "Witness my hand, Benson Fearon."

On the 27th. of February 1773, the defendant was appointed by patent (b) to the office, and afterwards on the nomination of the plaintiff constituted deputies for Carlisle, Whitehaven, and Workington; but having received the profits, did not account for them to the plaintiff; in consequence of which the bill was filed. A verdict was found for the plaintiff, with leave to move the court to enter a non-suit. On a rule to shew cause being granted, the case was argued by Adair and Roche, Serjts. for the plaintiff, and Le Blanc and Lawrence, Serjts. for the defendant; and the following judgment of the court was delivered by

LORD LOUGHBOROUGH.—On full consideration of all the arguments used in this cause, I am of opinion that the transaction which is the foundation of the action is illegal, and the agree-

(a). The plaintiff had given up the profits to his son in 1780.

(b) The following was the form of the Patent:

George the Third by the grace of God of Great Britain, France, and Ireland King, Defender of the Faith, and so forth. To all to whom these presents shall come greeting. Know ye, that we of our special grace, certain knowledge, and mere motion, have constituted and appointed, and by these presents do constitute and appoint, our trusty and well beloved Benson Fearon, Esquire, to the office of customer or collector of all our customs and subsidies in our port of Carlisle, and in all and singular the ports, places and creeks to the said port belonging or adjoining, in the room and place of Richard Grape, Esquire, deceased; to have, hold, exercise and enjoy the said office, unto him the said Benson Fearon during our pleasure, together with all and every the wages, fees, profits, perquisites, advantages, and emoluments whatsoever, to the said office or place in any wise belonging or appertaining, and in as full and ample manner and form to all intents and purposes as the said Richard Grape, or any other person or persons lately exercising the said office, hath or have had or received, or ought to have had or received by reason thereof. In witness whereof, we have caused these our letters to be made patent. Witness ourself at Westminster, the twenty-seventh day of February, in the thirteenth year of our reign, &c.

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ment void. This transaction concerns a public office, deemed by law to be a place of public trust prohibited to be sold; and even the deputation of which, where such deputation may be made, cannot be an object of sale. The transaction is, that *Fearon* being appointed by the recommendation of *Garforth*, shall not interfere in the office, but shall appoint such deputies as *Garforth* shall nominate, and pay to him the profits. The effect of this is, that to all profitable purposes, and as to all the exercise of the office except as to signing a receipt for the salary, *Garforth* is the real officer, but is not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, he may exercise inconsistent trades, he may act as a magistrate in affairs concerning the revenue, he may sit in parliament, and will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for not being the acting officer, he does not appear registered upon the records of the Exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a trust can be created in such an office, is for the consideration of the court in which the suit was originally brought: the only question in this court is, Whether the agreement springing out of such a transaction can support an action?

The written agreement of the 25th of February 1773, was for two purposes; one, to appoint such deputies as the plaintiff should name; the other, to pay over to him all the profits of the office. Though this case has been argued very fully and very ingeniously by the counsel on both sides, I do not recollect any argument used in support of the first promise, namely, to appoint at the nomination of another, deputies, for whom the person appointing is in point of law answerable, and those places he is not allowed to sell or bargain for. The argument and doctrine laid down in the case of *Smith v. Colehill*, 2 And. 55. which is similar to this, are, that if one part of the agreement were bad, no action could be maintained on any other part which might be good. But it is not necessary to rest on this point, because I am of opinion that the agreement is bad in both parts. If it be without any consideration in a court of law, no action will lie upon it; it is but *nudum pactum*. What then is the consideration upon which this agreement proceeds? It is that

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Fearon is appointed on the application of *Garforth*, in trust for him; this is the consideration. Now what is this but in plain terms this proposition; viz. that the public is abused, and the King deceived in the application? I should therefore not find much difficulty to conclude, if there were nothing more in the case, that the common law would not support an *assumpsit* on such an agreement.

But I think it is clearly void by positive law respecting this office. The appointment of any customer by any means contrary to the statute 12 Ric. 2. cap. 2. is a misdemeanour. That statute, though very antient, is certainly not obsolete; it is the statute under which they are sworn in the Exchequer. It not only prohibits the appointment, but goes on to say that "none that pursueth by him or by others, privily or openly to be in any manner of office shall be put in the same office or in any other," and the 5 & 6 Ed. 6. cap. 16. makes void all promises, bonds, and assurances as well on the part of the bargainor, as the bargainee. It is said that this was no sale of the office, that no money has passed on the part of *Fearon* to obtain it. But the statute does not stop there. It is neither confined in its expressions nor its intent. In the case where a person obtaining an office gives money, the words of the act are extremely general, and according to their obvious construction without any enlargement necessarily require that all bargains for money concerning those offices which are mentioned in the statute, are and shall be prohibited. Now is it not clear that the plaintiff has bargained with the defendant? Would the defendant have had the office without that bargain? The promise which is the ground of this action is, that the plaintiff shall have all the profits. By the words of the statute any profit, however small, would have affected the transaction; but here there is a bargain for the whole. Courts of law have very properly considered this as a remedial statute, and have construed it liberally where the validity of such a transaction has been brought before them.

The case of (a) *Sir Arthur Ingram* has been cited, and there it is clear that the transaction was not immoral; it was no otherwise wrong than as it was prohibited by a positive statute. It was a bargain between *Sir Edward Vernon*, and *Sir Arthur Ingram*, for a surrender of the office of cofferer of the household; on the surrender of *Vernon*, *Ingram* was appointed and a bond given to account for the profits. This was holden to be within the statute, because he had charge of the king's

(a) *Co. Lit.* 234. a.

money

money to pay the household. In that case the king was not deceived, the transaction was public and notorious, and the crown was disposed to have re-appointed the officer with a *non obstante*; but the question being referred to the Chancellor and twelve Judges, whether the king could by a *non obstante* give the right of receiving the appointment to *Ingram*, their opinion was, that the case was within the statute, and therefore that *Ingram* was disabled from taking the office, and could not by a *non obstante* be made capable of holding it. In the case of *Godolphin v. Tudor*, 6 *Mod.* 234. which is also in 2 *Salk.* 251. (a) which was mentioned in the argument, the transaction was between the principal and the deputy, and the agreement was, that the deputy executing the office should pay to the principal, out of the profits, a certain sum. The court there held, that where the agreement was to pay out of the profits a certain proportion of the profits, it was not within the statute; and the reason given is very plain and carries its own authority with it, namely, that the principal is intitled to all the perquisites and fees of the office, and the deputy to a recompence, as it were, on a *quantum meruit* for the labour he has in the execution of it. All the effect therefore of such an agreement is, to ascertain the share which the deputy should have for the execution of the office. But it is remarkable with what strictness the courts have holden that proposition, and how careful they have been to guard against any transaction that might give any colour to the principal's receiving a gross sum out of the profits of an office executed by a deputy. For in this case, as it is reported in 6 *Mod.* the agreement was, that *Tudor* should pay *Godolphin* 200 *l.* a-year, and it appeared upon record that the profits of the office amounted to 329 *l.* 10 *s.* every year in which it had been executed by *Tudor*; but as the stipulation was to pay 200 *l.* a-year absolutely without any reference to the profits of the office, the court thought themselves bound to give judgment for the defendant. Now that was a transaction perfectly fair, the mistake in stating the manner of the agreement was an innocent one, but the court would not permit the plaintiff to recover on an agreement, where it was not stated on the agreement itself, that the payment should be only of a portion of the profits, and not an absolute one of the whole.

Courts of equity in setting aside securities supposed to be valid at law, have gone by the same rule, and have been just as

(a) *S. C.* 2 *Salk.* 468. [But see it more fully stated, *Willes's Rep.* p. 575. n.]

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careful not to permit, by any construction, any breaches to be made in the provisions of the statute. The case of *Lockner v. Strode*, 2 Chan. Caf. 48. was quoted as a determination, where the court of Chancery held a looser rule with respect to giving a bond for the payment of a certain sum to the principal appointing a deputy. But that case is, as most of the others are in the same book, grossly misreported: no such determination was made, and both the state of the case, and the decision, are perfectly mistaken. I have a copy of it from Lord Nottingham's notes, from which it appears, that the defendant being sheriff, made John Lockner his under-sheriff, and the plaintiff, who was the brother of John Lockner, gave a bond as a temporary security till the common security was given. John gave a bond in the usual form from an under-sheriff to his principal, for performance of the covenants in the indenture; but the first bond was not given up. Strode after he was out of office arrested the plaintiff on it, who was obliged to give bail to Sir Francis Rolle, the succeeding sheriff in 600 l.; and to be relieved was the object of the bill. The defendant pleaded a special agreement, that the bond was to secure him 400 l. by quarterly payments for the under-sheriff's place. This the plaintiff denied, and also insisted that such an agreement was illegal and contrary to the statute 23 Hen. 6. cap. 9. The Chancellor being under doubts, a trial was directed, and the point reserved. So that no opinion was given by him on the validity of the transaction. The date of that case is also mistaken; it is stated in the report to have been Feb. 9. 1680, but it was in fact in Hilary term, 28 Car. 2. But in a subsequent case, Lord Nottingham very plainly intimated what would have been his opinion, if the agreement had been found good in law. That was the case of (a) *Juxton v. Morris*, which is in the same book and also misreported. By Lord Nottingham's notes it appears that a bishop's registrar made a deputation of his office, rendering thereout 90 l. per annum; the plaintiff exhibited a bill for an account, and the defendant pleaded that it was within the statute of 5. & 6 Ed. 6. and that there ought to be no account. It was answered, that this was only a reservation of part of the profits, and the principal being intitled to the whole, it was not illegal; which (says Lord Nottingham) "seemed specious." But upon looking into the bill, it charged an express covenant to pay 90 l. a-year, without reference to the profits of the office. The

(a) 2 Chan. Caf. 42.

plea was therefore allowed, and the bill dismissed. These cases connected, shewed that the opinion of the court of Chancery at that time, in considering how far these securities were liable to be avoided as contrary to the provisions of the statute, was, that between principal and deputy there might be a reservation out of the profits, (though Lord *Nottingham* did not expressly so determine,) but if otherwise, the security was clearly bad. In the case of (a) *Law v. Law*, Lord *Talbot* set aside a bond, supposing it to be good in a court of law, the consideration of which differed very little from the present. On the part of the plaintiff, the case of *Bellamy v. Burrow* was relied on as an authority to shew that a court of equity will permit a trust to be created of an office, clearly within the statute of *Ed. 6.* and on reading that case with attention, I admit it is a determination full to the point for which my brother *Adair* cited it; and undoubtedly as such a determination it is of very considerable authority, both in respect to the learning and the known integrity of Lord *Talbot*. But it is fit to be observed, that in the same case there stands very fully delivered the opinion of Sir *Joseph Jekyll* to the contrary; and it rests upon an opposition between two very learned and upright men. Either opinion is probable when there is such authority for its support. I will not enter into the consideration of that case, nor is it necessary to give an opinion here whether a trust can in any instance be created in such an office. I do not take upon myself to say, without other consideration than the present circumstances can afford, that there is no possible case in which a trust fit to be executed may not be created in offices within the statute of *Ed. 6.* This is not a case of the execution of a trust, the cognizance of which is peculiar to a court of equity. Perhaps if the Master of the Rolls had fixed on *Fearon* the character of a trustee, a court of law might not think itself at liberty to question the authority of the determination. But the whole question for a court of law to determine is simply, Whether there appears a good consideration on which an *assumpsit* can be supported? And I am of opinion, for the reasons I have stated, both on the principles of the common law, and because the transaction is in defiance of the statutes which have been made to guard against evils of the same nature, that the consideration of the promise

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(a) 3 P. Wms. 392.

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in this case is bad, that consequently it will not support an *assumpsit*, and therefore that a verdict must be entered

For the defendant.

Friday,
Feb. 12th.

COMPTON v. COLLINSON (a).

Where a married woman lives apart from her husband under articles of separation, by which he covenants that she shall enjoy to her own use all such estates both real and personal, as shall come to her during the coverture, and that he will join in the necessary conveyances to limit them to such uses as she shall appoint; and copyhold lands having afterwards descended to her, the husband again covenants in the same manner as before, and that he will join in surrendering such estates to such uses as she shall appoint, the wife may surrender the copyhold lands without the husband joining, and without a special assent for that purpose.

THIS case, which was sent out of Chancery for the opinion of this court, stated, that

In 1752 *Michael Collinson* married *Jane Banastre*, and had issue by her the defendant *Charles Steynsham Collinson* and *Mary Collinson*.

July 15, 1762, by articles of separation between the said *Michael Collinson* of the one part, *Jane Collinson* and *Charles Banastre* her father of the second part, and certain other persons of the 3d, 4th, and 5th parts, after stating the agreement to separate; the said *Michael Collinson* covenanted, that the said *Jane Collinson* should from thenceforth enjoy to her own use, all such estates both real and personal, as should come to her during her coverture, or that he should become intitled unto, in her right; and moreover that he would join with the said *Jane*, in levying a fine, or suffering a recovery thereof, and limiting the same to such uses as she should appoint. And the said *Charles Banastre* thereby covenanted, to indemnify the said *Michael Collinson* the husband, against all damages and expences, which he might sustain on account of his wife's debts contracted since the 12th day of June 1760, or which should be thereafter contracted.

August 17, 1770, the said *Charles Banastre* died. Upon whose death certain copyhold premises, held of the two manors of *Ryegate* and *Banstead*, descended to the said *Jane Collinson*, as the customary heir of her father, the said *Charles Banastre*. By indenture of three parts, made December 12, 1770, between the said *Jane Collinson* of the first part, the said *Michael Collinson* of the second part, and the trustees of the third part, after reciting, among other things, the articles of separation of the 15th of July 1762, the said *Michael Collinson* covenanted, that the said *Jane* his wife, should enjoy to her own use, all the real and personal estate of her father, as well as any other real estate, that might in any manner come to her, during the coverture, and that he would join in levying a fine, suffering a recovery, or making a surrender of such estates, and in limiting the same, to such uses as she should appoint.

(a) Vid. 2 Brown Rep. Cto. 377.

May

May 16, 1771, the said *Jane Collinson* was admitted to the copyholds held of the manor of *Banstead*, and on the same day she surrendered them to the use of her will.

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June 3, 1771, the said *Jane* was admitted to the copyholds, held of the manor of *Ryegate*, and on the same day she surrendered them to the use of her will. July 5, 1772, by a certain paper writing, of that date, purporting to be the will of the said *Jane Collinson*, she devised the copyholds held of both manors, subject to debts, legacies, and funeral expences, to *John Willis* and his heirs, and appointed him executor. July 15, 1772, the said *Jane Collinson* made an absolute surrender of the copyholds held of the manor of *Banstead*, to the said *John Willis* and his heirs; and the same day the said *John Willis* was admitted thereto, and at the same court the said *John Willis* surrendered the said copyholds, to the use of his will.

July 15, 1772, the said *Jane Collinson* made an absolute surrender of the copyholds held of the manor of *Ryegate*, to the said *John Willis* and his heirs, and the same day, the said *John Willis* was admitted thereto, and at the same court the said *John Willis* surrendered the said copyholds to the use of his will.

Michael Collinson, the husband of *Jane*, did not join or concur in any of the aforesaid surrenders made by *Jane* his wife.

July 26, 1772, the said *Jane Collinson* by another writing of that date, purporting to be a codicil to her will, after reciting the said surrenders, and that the same were made in trust, for securing the payment to the said *John Willis*, of such sums as he should during her life advance for her use; declared, in case the copyholds should not be sold at her death, for the purpose of paying her debts; then that the said *John Willis* should stand seised thereof, charged with all sums, which should be due from her at her death, or which he should pay by her order, and the fines and fees of admission; in trust for himself, his heirs, &c.

September 1, 1772, the said *Jane Collinson* died, leaving the said *Michael Collinson* her husband surviving her, and *Charles Steynsham Collinson* her heir at law, and heir according to the customs of the said manors of *Banstead* and *Ryegate*.

The question was, Whether *John Willis* took any and what estate under the surrenders, will and codicil of the said *Jane Collinson*, or under either, and which of them?

This was argued in *Easter* term last, by *Lawrence*, Serjt. for the plaintiff, and *Bond* Serjt. for the defendant, and in *Michaelmas* term, by *Le Blanc*, Serjt. for the plaintiff, and *Adair*, Serjt.

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for the defendant. On the part of the plaintiff, it was contended that *John Willis* took an estate in fee of the premises, according to the custom of the respective manors, under the different surrenders made by *Jane Collinson*, after her separation from her husband, a separate maintenance allotted to her, and after he had been indemnified against any debts she might contract, and had covenanted that she should have to her own use all the estates both real and personal of her father, or that might descend to her during the coverture, and that he would join in levying a fine, suffering a recovery, or making a surrender of such estates, and limiting them to such uses as she should appoint.

The difficulty arises from the husband not having joined in the surrenders. But this may be obviated by considering the reason why in general it is necessary for a husband to join in the surrender of copyholds belonging to the wife. The reason is, because he has an interest in the lands during the coverture, which is not to be given up without his testifying his consent; inasmuch, that a custom in a particular manor for a wife to surrender her copyholds without the concurrence of her husband, has been holden to be bad. 2 *Will.* 1. But where the husband, as in the present case, agrees that the wife shall dispose of her property, he renounces his interest, and the difficulty is at an end. *Cessante ratione, cessat et ipsa lex*. Besides, as by the deed of separation the husband was indemnified for his wife's debts, there was a valuable consideration, and a court of equity would decree a specific performance of an agreement for a valuable consideration. By the common law, the wife loses all power of separately disposing of her property; the husband has an absolute right to all her personalty, and a qualified one, during her life, to her real estates. If she could either sue or be sued, she might be taken in execution, and the husband deprived of his right over her person. The incapacity of an infant arises from a want of skill and judgment, but that of a feme covert from want of property, and because she is supposed to act under the controul of her husband. There are many cases, indeed, where the surrender of the wife's copyhold made by her and her husband is holden to be good, by the customs of particular manors; but in those cases, both the husband is a party on account of his interest, and she examined separately as to her consent. The authorities of *Dyer*, 363. b. *Moor*, 123. *Cro. Eliz.* 717. *Litt. Rep.* 274. and 2 *Will.* 1. shew, that a custom for a feme covert,

to surrender and devise with the consent of her husband, is good. The criteria (by which a custom of this sort has been holden reasonable or not) to be collected from these cases, are, the husband's joining to shew his consent, and the separate examination of the wife, to prove that she does not act under the husband's controul. In *Coke's Entries*, 576. such a surrender is pleaded without a special custom to warrant it, and no objection made. But as the principal thing to be attended to is the husband's consent in these circumstances, in order that his interest may be preserved, so there are other cases, where the husband having no particular interest, the wife may convey without his assent. As in *Daniel v. Ubley*, Sir *William Jones*, 137. where seoffment and livery were made by a married woman, of an estate given her by a former husband, without the second husband joining. So in *Bro. Abr.* tit. *Cui in Vita*, pl. 16. where it was holden that a married woman might convey without her husband's concurrence, an estate given to her on condition to sell.

The question then is, Whether in the present case, the wife was not to be considered as a feme sole? Her husband and she were separated by mutual consent, he was discharged from her debts, and had expressly, by his own act, given up his interest in her property when he covenanted that she should dispose of it, and had confirmed her in the possession of it after the descent from her father. Although it is a general rule of law that a married woman can neither sue nor be sued without her husband, yet there are many exceptions to this rule, as where the husband was an exile or had abjured the realm, in which cases she might defend a plea of land as a feme sole. *Co. Litt.* 132. b. *Bro. Abr.* tit. *Bar. & Feme*, pl. 66. and in 2 *Vern.* 104. it was holden that the wife of a man banished for life, might in all things act as a feme sole and make a will. So also in *Deerly v. The Duchess of Mazarine*, *Salk.* 116. the wife of an alien enemy was sued on a contract as if she had been single. The same principle was laid down by Mr. Justice *Yates* at *Carlisle*, where he held that the wife of a man transported might be sued alone. *Sparrow v. Carruthers*, cited 2 *Blac.* 1197. So also, according to the more modern authorities, where by a deed of separation the husband covenants with trustees to renounce all his interest in the property of his wife, and is indemnified from her contracts, she is considered as a feme sole. She is put in the same situation as by the old law she would be if her husband were an exile or had

1790. abjured the realm. The husband is considered as having renounced all his marital rights, 1 *Burr.* 542. This doctrine is fully established by the cases of (a) *Ringstead v. Lady Laneborough* (b), *Barwell v. Brooks*, and *Corbet v. Poelnitz*, 1 *Term Rep. B. R.* 5. Then what has the wife done in this case? Being sole tenant of copyhold lands to which the husband has expressly given up all his claim, (which would otherwise be the only material obstacle,) and having the whole power over them, she exerts that power by surrendering them to the lord, under which surrender the plaintiff claims, who is the representative of *Willis*.

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On the part of the defendant, it was argued, that as the husband did not join in the surrenders they were bad, and the descent to the heir at law must take effect. This was an executory contract on the part of the husband, which shews on the face of it that the wife could not convey alone; for if she could, it would be unnecessary for him to covenant that he would join. But the heir at law is not to be disinherited by an executory contract. The question is, Whether any legal estate passed by the surrenders? As the case was sent from a court of equity for the opinion of a court of law, all equitable considerations must be laid aside. In *Peacock v. Monk* (c), Lord *Hardwicke*, after noticing the distinction between real and personal property, expressly determined, that where the husband did not concur, the conveyance by the wife of a real estate should not operate to deprive the heir. It is also to be observed in this case that no special custom of the manors is stated to warrant the surrenders by the wife alone, nor that she was separately examined by the steward according to the general law of copyholds. But the law is, that a feme covert cannot convey a real estate without the concurrence of her husband. Though in the cases mentioned by Lord *Coke*, *Co. Litt.* 132. b. a feme covert was permitted to sue for and recover lands, yet it by no means follows that she can dispose of them. By the antient common law a feme covert could not, even by joining with her husband in any conveyance whatever, bar herself or those claiming under her, of her own estate. The principle upon which in process of time she was allowed to alienate by fine was, that a fine being the compromise of an adversary

(a) *B. R. Hil. 23 Geo. 3.* reported in *Cooke's Bankrupt Law*, last edit. 32.

(b) *B. R. Hil. 24 Geo. 3.* *Cooke's Bankrupt Law*, last edit. 36.

(c) 2 *Vane*, 190.

suit,

fuit, and the concord being deemed to have the same effect as a judgment in a real action, the woman being tenant of the land, and brought before the court with her husband, was bound by that compromise, which was as effectual as a judgment. The first mention of the examination of a married woman joining in a fine, is in the *stat. de modo levandi fines*, 18 Ed. 1. §. 4. the equity of which was afterwards extended to recoveries, *Mary Portington's* case, 10 Co. 43. a. But a recovery cannot be suffered by a married woman so as to bind her without her husband. *Shep. Touch.* 41. Where indeed the wife alone levies a fine, and the husband does not avoid it, the wife is estopped after his death, and her heirs are concluded by the estoppel. *Shep. Touch.* 14. *Polluxfen*, 24. But it does not follow that she can convey alone in other circumstances. The *jus possessionis* is in the husband, the *jus proprietatis* only in her. She has not such a quantity of estate as the law requires to make a conveyance. The cases cited on the part of the plaintiff, shew that there are certain exceptions to the general rule of law, but unless the present case can be brought within those exceptions, the rule of law must have its course. But in truth none of those cases are applicable. In the old authorities cited from *Co. Lit.* 232. b. the husband was either exiled, or had abjured the realm. In the case of *Deerly v. the Dutchess of Maxarine*, the husband was an alien enemy: in 2 *Vern.* 104. he was banished by act of Parliament. In all those cases the husband was under an incapacity to sue. But in the present case, he was not only under no incapacity, but had expressly covenanted to join in a conveyance. As to the more modern cases of *Ringstead v. Lady Laneborough*, *Barwell v. Brooks*, and *Corbet v. Poelnitz*, many able lawyers have been surprised at the extent of the doctrines laid down in them. But whether those cases be good law or not, they only concern personal property. The rules which govern real property are of a different nature. As the husband has an absolute right to his wife's personal property, he may renounce it without injuring any one: but having no more than a qualified right to her real estates, he cannot join to disinherit the heir, unless certain prescribed ceremonies be performed. As to the case of *Daniel v. Ubley*, there the wife acted under a power of appointment, the estate was given to her on condition: if she had not made any appointment, the elder son would have taken the estate by descent; as it was, the second son took it, by the father's will, through the medium of the

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1790. mother's appointment. The cases cited from *Dyer*, *Moore*, *Cro. Eliz.* and *Litt. Rep.* prove only, that a custom, for a married woman to surrender and devise with the junction of her husband is good ; but they do not shew that such a surrender or devise would be good without the husband joining ; and here it is expressly stated that he did not join. In those cases, the question was as to the validity of a custom for a feme covert to surrender ; there was no doubt respecting the general rule of law : the question indeed of itself imports, that without a custom the surrender would not be good. The passage in *Coke's Entries* proves no more than that a special custom for a married woman to surrender need not be stated on the record : but it does not follow from thence that her surrender would be valid without such a custom. Yet it was said, that in this case the husband had done what was tantamount to joining in the surrender by assenting in the deed of separation, to the wife's sole disposition of her property ; but the law adapts the mode of assent to the act to be done ; the surrender could not be complete without the husband actually joining. *Taylor v. Phillips*, 1 *Vez.* 229.

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Cur. vult advis.

On this day, the judgment of the court was thus given by

LORD LOUGHBOROUGH.—The question in this case is, Whether *John Willis* took any, and what estate under the surrenders, will, and codicil of *Jane Collinson*, or under either, and which of them ? The subject of dispute being copyhold lands, it is evident that unless the surrenders be valid, no estate can pass at law. No special custom is stated, and therefore the surrenders must be judged of by the general law of copyhold estates. The several surrenders, on the face of them, are the surrenders of *Jane Collinson* as a feme sole : for it is not stated that she was privately examined, nor is any notice taken of her being a feme covert, nor is there any assent, or evidence of assent on the part of the husband accompanying the surrenders. She is stated by the case, to have been in truth the wife of *Michael Collinson*, separated from him, first, by articles renouncing all his right to whatever estates, real or personal, might come to her during the coverture ; and secondly, by deed after the copyhold estates had descended to her, covenanting that she should enjoy the same to her own use ; and that he would join in making a surrender of such estates, and in limiting them to such uses as she should

should appoint. By force of these articles, and of this deed, all the right of the husband is barred. The question therefore is: Whether the surrenders of *Jane Collinson*, her husband not having joined, shall bar her heir? There are two distinct surrenders of each copyhold: the first made *May 26* and *June 3*, 1771, to the use of her will; the second *July 14* and *15*, 1772, absolute surrenders to *John Willis*, on which he was admitted, and which he on the same day surrendered to the use of his will. If *Jane Collinson* had a full power to make a valid surrender, the last surrenders have passed all her estate at law to her surrenderee. These surrenders took effect immediately, she could not herself have avoided them, nor could the husband against his own covenant. If she had sued jointly with her husband to avoid them, it would have been incongruous to have alleged as a defect in the surrender, the omission of that which the husband had covenanted to do, and which it was in her power to procure; and if she had sued as a feme sole against her own surrender, it would have been still more preposterous. If therefore *Jane Collinson* could not have avoided these surrenders, it is difficult to conceive how her heir should be in a better condition with respect to an absolute surrender binding upon her, whatever claim he might have against a surrender to the use of her will. It cannot be more necessary that the husband should join with his wife in the surrender of her copyhold, than in levying a fine of her freehold estates. But it has been settled ever since the case in the 17 *Ed. 3.* (a), that if a fine be levied by a feme covert without her husband, it shall bind her and her heirs, if it be not avoided by the husband; and both (b) *Rolle* and *Comyns* seem to intimate, that the law would be the same as to a recovery. Had the present case been of a freehold estate conveyed by the wife by fine, without her husband, it would clearly have bound her heirs, and the husband being estopped by his deed, the estate of the donee would have been indefeasible at law. The modes of conveying freehold and copyhold estates are different, but there is surely a fair argument from analogy, that a copyhold estate transmissible under the same circumstances as a freehold, should be governed by the same rules. Both are public conveyances, and from the nature of copyholds, there is more reason to support the surrender of a feme covert, where the interest of the husband is not affected

(a) *Year Book*, 17 *Ed. 3.* c. 2 & 78. 17 *Aff.* pl. 17. *Bro. Abr.* tit. *Fines*, pl. 75.

(b) 1 *Roll. Abr.* 346. l. 50. *Com. Dig.* tit. *Bar. & Feme*, (P 1.)

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by it, than there is to make a fine effectual without his joining. Of a freehold estate the husband is *seised* in right of his wife, of a copyhold he has a mere *possession*. He is not admitted in her right; she is the actual tenant; and when a copyhold descends to a married woman, the new grant of the lord is to her, and not to the husband. In opposition to this reasoning, two cases were cited at the bar, which were supposed to have denied the application of any argument drawn from the case of a fine, to the validity of a surrender; and to have asserted the absolute nullity of a surrender by a feme covert, without the concurrence of her husband. The first of these cases is *Taylor v. Philips*, 1 *Vez.* 229. Now all that can be inferred from that report of Lord *Hardwick's* opinion is, that if the fact had been fully before him, he would have made a case for the opinion of a court of law upon this very question, Whether a surrender by a feme covert without her husband's joining, but with his assent, was an effectual surrender? But as there was some reason to suppose there might be a special custom to warrant that surrender, he directed a trial. It is evident then, that Lord *Hardwick* was of opinion, that a custom for a feme covert to surrender without her husband joining, might be a good custom, for otherwise the trial would have been idle, and he would have directed at once a case for the opinion of the judges. This observation will also materially apply to the next case, which is *Stephens v. Tyrrell*, 2 *Wils.* 1. where according to the report, the court of Common Pleas held, that a custom for a feme covert to surrender without her husband's joining is contrary to law and bad. In this case it is said, that the Chief Justice observed, that it was not stated whether the husband was to consent though he did not join, and therefore it must be taken to be without his consent. Now the natural inference from thence is, that the consent of the husband, though he did not join, would have made the surrender effectual. The Chief Justice there censures an inaccuracy in 2 *Danvers' Abridgment*, 430. pl. 10. cited in support of the custom, and the remark is just. But when one looks into the cases referred to in *Danvers*, it is evident that they furnish an authority in support of a surrender without the husband's joining in the act of the surrender. The first is an anonymous case in *Moore*, 123. where a custom for a married woman to devise her copyhold lands, with the assent of her husband, was holden to be good. The next are 3 *Leon.* 81. *Godb.* 14 & 143. and 2 *Brownl.* 218. which

which all treat of the same case, viz. *Skipwith's* case. There were two parts of the custom alleged in that case; the one, that a married woman might devise; the other, that she might surrender in the presence of the steward and six of the tenants. The state of the case in *Leonard* shews that the will was made in favour of the husband, in the presence of the steward and six of the tenants, and at the next court the surrender to the use of the will was also in the presence of the steward and six of the tenants. The custom seems to have been holden good in substance, and it is probable that it was so from the citation in (a) 2 *Brownl.* 218. This is therefore an authority that a surrender without the husband's joining, though certainly in a case where his assent might be presumed, is good. The reasoning of the Chief Justice, according to *Wilson's* report, proceeds upon a supposition that the custom stated excludes the husband entirely, because it does not expressly require his consent, and that it would therefore enable the feme covert to dispose of her estate against his consent. But this is by no means a necessary conclusion. A surrender without the husband may be a good disposition against all but him, and his right to avoid it is not inconsistent with such a custom. The reasons, therefore, on which the custom in *Wilson* is condemned, do not appear quite satisfactory; and it has always appeared to me somewhat arbitrary to condemn a custom because it is not conformable to the general law and policy of the nation. That estates should be holden in some manors by an heiress independent of her husband, is not more singular than in others that the estate should vest absolutely in the husband by the intermarriage, which is the case in some manors in *Westmorland*. This case then goes no further than an opinion that a surrender, in which the husband neither joins nor assents, cannot be good; but if that opinion were well founded, it would not affect the present case. In both *Vezey & Wilson*, the observation made on the analogy of a fine is, that it works by estoppel. In the case in *Vezey*, Lord *Hardwicke* is speaking of the fine of a tenant in tail, where no interest passes, which he says, will be good against the heir by estoppel, and the phrase is there correctly used. But as to a feme covert levying a fine, where it conveys an interest it shall bind her and her heirs, if the husband does not enter and avoid it, because, says Lord *Coke*, she was examined and has power over the land. 10 *Rep.* 43. a. The fine there passes the estate, and when it is said that she is estop-

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SON.(a) It is there cited *arguendo*, by the name of *Shegg's* case.

1790. ped by it, the expression is used in the same loose manner as when it is applied to any other person contending in opposition to his own deed, by which he has passed away the interest and estate which he would claim.

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It was objected in the argument, that no custom is stated in the case, and that a surrender by a feme covert even with the husband's joining, can in no case be good but by the particular custom of a manor. No authority was cited for this position, but it was argued that from the several cases, *viz. Dyer, 363. b. Cro. Eliz. 717. and Litt. Rep. 274.*, (in which the validity of a custom for a feme covert being separately examined, and her husband joining to make a surrender, is affirmed,) it was strongly implied that such a surrender would not be good by the general law of copyholds. This objection rests on a supposed defect in the statement of the case. But the court will intend that the surrender by the wife separately examined with the husband joining, would have been good. The case could not otherwise have been made, and even if the argument had been upon a special verdict, the objection would not prevail. For it would be contrary both to law and reason, that the copyhold of a woman should become unalienable by her marriage, and it is against the nature of copyhold estates that they should not be surrendered back to the lord, by the act of all the persons having any interest in them, and having a disposing power.

Lord Coke says, "This is the general custom of the realm, that every copyholder may surrender in court, and need not to allege any custom therefore." *Co. Litt. 59. a.*; and in *Combe's case, 9 Rep. 75.* it is holden to be a necessary consequence of this, that every copyholder may surrender by attorney as a thing incident by the common law; and in the pleadings of that very case, a surrender by a feme covert and her husband is pleaded without any custom being alleged. *Co. Entries, 576.* The cases which are said to afford a negative implication, that without a custom, the surrender by a husband and wife of the copyhold of the wife would not be good, cannot be so construed. The case in *Dyer, 363. b.* arose upon a question, Whether a custom in the vill of *Denbigh*, that a feme covert with her husband, by surrender and examination in court might alien her land? was taken away by the statute of *Wales, 27 Hen. 8. c. 26.* and the opinion of *Dyer & Wray* was, that such custom was not abrogated, because it was reasonable and agreeable to the custom of *England* for the assurance of purchasers. The case in *Cro. Eliz. 717.* states a ques-

a question, Whether the examination of a feme covert out of court by two tenants be good, without a special custom; and it is holden that it is not, because it is a judicial act more proper to be done in court; admitting at the same time that a surrender on a sole examination in court would bind her by the *custom, i. e.* by the *general* custom; for though the state of the facts does not appear by the report, it is fairly to be collected, that no special custom for a feme covert to surrender in court was given in evidence. The short note in *Litt. Rep.* 274. seems more to favour the argument than the two preceding cases, which attentively considered rather make against it. But it may easily be discovered why in the case of *Littleton* the defendant chose to allege a custom rather than to rely on the general law. He makes use of terms much more extensive than the general law; he pleads a custom that *quælibet fœmina viro co-operta, (including infants,)* may surrender: the plaintiff replies that every woman of full age may surrender without traversing the custom that *quælibet fœmina, &c.* and the court holds the replication bad, for he ought to have traversed the custom alleged by the defendant. It might be a question, Whether by special custom, a feme covert infant could not surrender, though it is contrary to the general law? and therefore it is pleaded that *every* feme covert may surrender: but such a case affords no inference that it was necessary to allege a custom for the general position that a feme covert with her husband might surrender.

For these reasons, this objection ought not to prevail even so far as to induce the court to desire a fuller state of the case; which would be the only effect it could have; for the customs of most manors being consonant to this general law, there is little doubt but such a custom might be truly stated in any case, where it were necessary that it should be particularly alleged.

The general objection to the validity of the surrenders, *viz.* that by the common law a feme covert is incapable of disposing of her lands without the concurrence of her husband, has been in part already considered; but it may be fit to examine this position more particularly. It certainly is, generally speaking, a true one, though perhaps not quite correctly expressed; for a feme covert has no power to convey with her husband except by fine or recovery. It would be more accurate to state the law to be, that a married woman can make no conveyance of her lands except by fine or recovery, and that a fine levied by her alone is avoidable only by her husband. It is equally a general rule of law,

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1790. law, that a feme covert cannot sue or be sued without her husband, and that she can make no contract to bind herself. These rules are established on the principle (partly religious, and partly political,) that she has entered into an indissoluble engagement, by which she is placed under the power and protection of her husband, given up to him all personal property in her actual possession, and the right to receive all such as may be reduced into possession. To these general rules there have been, in the process of the law, various exceptions allowed, where the principle of the rules could not be applied to the circumstances of the case. In the case mentioned in *Co. Litt.* 132. *b.* and stated at large in *Ryley Plac. Parliam.* 19 *Ed.* 1. *p.* 66. the husband having abjured the realm for felony, the wife was permitted to sue and had judgment to recover seisin of an estate, of which she was jointly enfeoffed with her husband for life, against the lord, who after satisfaction made to the king for the year, day, and waste, claimed to have the land by escheat. In the 31 *Ed.* 1. it was holden, that the wife of one who had abjured the realm could make a feoffment by deed with warranty of her land, and should be bound by it. *Fitz. Abr. Cui in Vita*, *pl.* 31. In the (a) 10 *Ed.* 3. a *quare impedit* was brought for the King against the Lady *Maltravers*; she pleaded coverture, and upon the replication for the king, that her husband was exiled for a certain cause, she was ruled to answer. In the (b) 1 *Hen.* 4. the same point was determined in the case of the Lady *Bellknap*, whose plea of coverture was over-ruled on a replication, that her husband was exiled; and in the following year, 2d of *Hen.* 4. the same lady sued in her own name, and her suit was allowed. Lord *Coke* does not take notice of a circumstance mentioned in the Year Book (c) and in (d) *Brook's Abridgment*, that some of the justices said, she sued as farmer of the king; which seems to strengthen the authority, for it shews that during the exile of the husband she acted as a feme sole, holding an interest under a grant from the king, by which she might both sue and be sued alone. A feme covert may convey in execution of a power, *Sir W. Jones*, 137. and *Latch*, 39. and 134. and though in that case there is much debate in the court, and a difference in opinion, whether the wife had any estate, and whether she could convey in execution of a trust without her husband, yet all agreed that her feoffment without her husband was a valid act. A feme may execute a power to sell lands without her husband, and may sell them to

(a) *Co. Litt.* 132. *b.*(b) *Co. Litt.* 133. *b.* case of *Sibel*, *B. Year Book*, 1 *Hen.* 4. 1. *pl.* 2.(c) 2 *Hen.* 4. 7. *pl.* 26.(d) *Tit. Baron and Feme*, *pl.* 66.

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him. *Co. Litt.* 112. a. A feme covert may act in *auter droit* as an executrix without her husband; and it is said, that she may administer, or prove the will notwithstanding his refusal. *Com. Dig. Administration* (D). In the three instances last mentioned, the law supports the act of the wife alone, because the husband has no interest in the execution of it; and in all the former instances, she is enabled to act by herself, because she cannot have the authority of her husband, whose exile or abjuration, though it does not dissolve the marriage, suspends the marital power.

Cases of separation, and in consequence of the relinquishment of the marital rights by the agreement of the husband, were not likely to have often occurred in the simplicity of antient times. But there is a case in the year book 47th of *Ed. 3. c. 18. (a)* which shews that they were not then totally unknown in the law. "An action of account was brought against one as bailiff of the plaintiff's land, to which the defendant pleaded, that there was a debate between the plaintiff and his wife, on which by the accord of their friends, the plaintiff assigned to his wife for her maintenance, the lands of which the account was demanded, and that the wife leased these lands to him for a term of years. The plaintiff insists, this is no plea, and amounts merely to a denial of the defendant being bailiff; but the court held, that he must answer the plea. And then the plaintiff traverses the lease alleged to be made by his wife." This case seems to prove, that a feme covert might dispose of the profits of lands allotted for her maintenance, and make a lease of them without her husband joining in the lease. In *Croke Charles* there are two cases, on bonds given to secure the disposal of a sum of money by a married woman. The first of them was in the 5 *Car. 1. Cro. Car.* 219. (b) It was an action upon a bond given by a man after marriage, conditioned to permit his wife to make a will, and dispose of a sum not exceeding 50 *l.* in legacies, the defendant pleaded that the wife did not make any will, and on that plea issue was joined. It was found specially that she did make a will, and disposed of divers legacies not exceeding 50 *l.* but that she was covert at the time of making the will. Judgment was given for the plaintiff, for though by law a feme covert could not make a will without her husband's assent, yet it was a will within the meaning of the condition. The other case was in the 10 *Car. 1. Cro. Car.* 376. It was an action on a bond conditioned to pay 300 *l.* after the death of the wife

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1790. by the husband, in case he survived, for such uses as she should
 COMPTON appoint by any writing under hand and seal, in the presence
 of two witnesses. The defendant pleaded that she did not ap-
 point. The plaintiff replied, that she by her will in writing,
 sealed and published in the presence of two witnesses, did will
 and appoint such sums to be paid; to which the defendant de-
 murred, and judgment was given for the plaintiff. The argu-
 ment seems to have been upon the pleading this writing as a
 will, and not as an appointment. But the court held it to be
 sufficient, for though it was not properly a will, being made by a
 feme covert, yet it was a writing in the nature of a will.

Courts of law then, had at this period recognized the power
 of a married woman authorised by her husband, to make in effect
 a testamentary disposition of personal property.

The case of (a) *Manby v. Scott*, decided soon after the resto-
 ration on an action which had been commenced during the usurpation of *Cromwell*, gave rise to a very large discussion of the
 rights of husbands and wives. It seemed then to be the opinion
 of the majority of the judges, that the husband could not be
 sued for any debt contracted by the wife without evidence of his
 assent; consequently for no debt contracted by her when wilfully
 separated from him. *Hale* held the rule so strict that in a case
 reported, (b) 2 *Levinz*, 16., some years after the judgment in
Manby v. Scott, he non-suited the plaintiff, in an action brought
 by a gaoler against a husband for the diet and lodging of his
 wife. It appeared in the case, that the husband had left his
 wife in the country, and come up to *London*, where he married
 another woman. The former wife caused him to be indicted, and
 coming to *London* to prosecute, was by his contrivance arrested
 and sent to gaol. The husband was convicted on the prosecution.
 Yet *Hale* would not allow this peculiar case of the husband's
 procuring the arrest, to be an exception to the rule, which re-
 quired his assent to the debt. Subsequent cases however relaxed
 the extreme rigour of this rule, as where the husband turns the
 wife out of doors, he gives her credit wherever she goes, according
 to *Holt's* opinion. (c) *Salk*. 118. But still in the case of a wilful
 separation by the wife, the law was understood to be, that the
 husband was not liable to be sued for her debts. It seems very
 certain, that the Judges who argued the case of *Manby v. Scott*,
 did not conceive that an action could be brought against the wife.
 It was equally the supposition of those who maintained that the

(a) 1 *Lev*. 5. (b) *Ca'usly v. Plummer*. (c) *Ethington v. Parrot*.
 husband

husband was not chargeable, as of those who held the contrary, that the wife was incapable of having any property, could acquire no credit on her own account, and must either subsist on charity, or starve, unless she could obtain an alimony from chancery or the ecclesiastical court. On the one side, this situation of the wife separated from her husband, is urged as a strong argument to support the conclusion that the husband is liable to an action for necessities; while they who argue on the other side contend, that the distress in which the wife is placed, is a just and expedient consequence of her separation from her husband, from which the law ought not to relieve her. It does not seem to have occurred to any of the Judges at that time, that a wife separated from her husband may in fact possess property, that she will obtain credit by means of her apparent property, and that the consequence of her debts not being recoverable either against her or her husband, would only be prejudicial to the unwary but honest tradesman.

The first case which appears, after this determination of *Manby v. Scott*, of an action brought against a married woman, is that of the *Dutcheß of Mazarine*. 1 Salk. 116. Lord Raym. 147. Comb. 402. in which the court avoid the question, though she was holden liable to the action. The Reports say, it may be intended she was divorced, or her husband an alien enemy, and perhaps it may be like the Lady *Bellknap's* case, whose husband was exiled. The only notes of the case are very short, and the point appears to have been made upon a motion for a new trial, in which the court felt what the justice of the case required, and were not pressed to explain the grounds of their opinion. It would however have been a strange situation, if the *Dutcheß of Mazarine*, a woman enjoying a considerable fortune of her own, and for many years a large pension from the crown of *England*, had been protected from every legal demand, by a rule of the law of *England*, that no action could be brought against her, because she had a husband whose person and fortune were utterly unknown, and could not be attached by any one with whom she dealt. The only two grounds hinted at for the decision, could not have stood examination. She neither was nor could be divorced, the law of *France* not permitting a divorce; and though in the term when the motion for a new trial was denied, the treaty of peace had not been signed, and a *Frenchman* was then an alien enemy, yet that argument would not have been applicable in the next term. The question, Whether a married woman separated from her husband, and enjoying by
his

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1790. his agreement, a separate provision, shall be liable for her debts, has come before the courts in several cases. In that of (a) *Ringstead v. Lady Laneborough*, Hil. 23 Geo. 3. the point was directly brought before the court of King's Bench upon the record, and judgment given that she was liable. In that case, the husband was stated to be out of *England*. But in (b) *Hil. 24 Geo. 3.* the same question was brought before the court, the husband being in *England*, and the same judgment given. In *Mich. 26 Geo. 3.* the same question was again stated upon the record, in the case of (c) *Corbet v. Posnitz*, with this difference only, that in that case the contract was for money, in the others, for goods; and the judgment was the same. About the same period, *East. 16 Geo. 3.* the question was agitated in this court; first, in the case of (d) *Hatchett v. Baddeley*, where the Chief Justice and my brother Gould took a distinction on the pleadings, which neither stated a separation, nor a separate maintenance, but that the wife had eloped and lived separately from her husband; which distinction has certainly great weight. But the two other Judges held that the action would not lie, merely on the ground of the defendant being a married woman. In *East. 18 Geo. 3.* the question was again submitted to this court, the case of (e) *Lean v. Schultz*, on pleadings which distinctly stated a separation, and separate maintenance; but the question itself then received no determination, the court having given judgment merely on a point of form, namely, that the husband ought to have been joined for conformity.

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From this state of the decisions, it cannot be concluded, that it is a settled point, that an action may be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance (f). But supposing the law to be according to the three last determinations of the court of King's Bench, it seems to be a necessary conclusion, that a married woman whose separate property consists of a copyhold estate, should have a power to surrender it, for otherwise the law would compel her to pay, without allowing her to use the means of paying, and enable the creditor to recover a demand, without the power of making that demand effectual. This is certainly an argument from inconvenience alone, and therefore not altogether conclu-

(a) *Cooke's Bankrupt Law*, 2d Ed. 32.

(b) *Barwell v. Brookes*, *Cooke's Bankrupt Law*, 2d Ed. 36.

(c) 1 *Term Rep. B. R.* 5. (d) 2 *Black.* 1079. (e) 2 *Black.* 1195.

(f) [See *Marshall v. Rutton*, 8 *Term*] under such circumstances he sued on a com-
Rep. B. R. 545. that a feme covert cannot tract as a feme sole.]

five; but it has great weight when no possible inconvenience can be opposed on the other side. The interest of the husband is entirely out of the question; the interest of the lord is not hurt by the surrender; the expectancy of the heir is not an interest, and slight as it is, cannot be set up as a claim in justice, to take the estate without paying the debts.

But the main and substantial ground of the case is, that the wife is the tenant of the copyhold and not the husband; that the estate can be forfeited or surrendered only by her acts, not by his; that the authority which he acquires by his marital rights to direct and controul her acts, is by his covenant in the present instance annulled, or at least suspended; and there is then no impediment to the validity of an act, passed in the court of the manor between her and the lord.

The certificate sent to the court of Chancery, was as follows :

“ Having heard counsel on both sides, and considered this question, we are of opinion, that *John Willis* took an estate to him and his heirs, according to the several customs of the manors of *Banstead* and *Ryegate*, under the surrenders and admittances of the 14th and 15th of *July 1772*.” *Loughborough.*

H. Gould.

J. Wilson (a).

(a) [But see *Bard & Ux. v. Webb & al.* 2 Bof. & Pail. 93.]

ROUSE v. BARDIN and Others.

Friday,
Feb. 12th.

TO this action of trespass for breaking and entering the close &c. of the plaintiff called *Brompton Heath*, the defendants pleaded in justification, a right of way in the following words: “ That from time whereof the memory of man is not to the contrary, there has been a *public common highway*, for all the liege subjects of this kingdom, to pass and repass, on foot, from a certain other common and public king’s highway, leading from *Knightsbridge*, in the county of *Middlesex* aforesaid, unto a certain place called *Earls Court*, in the parish of *Kensington*, in the said county, in, through, over, and along, the said close, called *Brompton Heath*, otherwise *The Heath*, otherwise *The Field*, otherwise *The Garden*, in which, &c. unto a certain other common and public king’s highway, leading from *London* to *Fulham* in the said county and back again from the said last mentioned close, in which, &c. to the said first mentioned King’s highway, at all times of the year, at their will and pleasure, &c.”

terminus a quo, viz. the way leading from *A.* to *B.* over the *locus in quo*, to a different way called *E.* and along that way into the way leading from *C.* to *D.* the *terminus ad quem*.—In pleading a public highway it is not necessary to state any *termini*.

In trespass, a plea of justification stating that a public highway led from another highway (leading from *A.* to *B.*) in, through, over and along the *locus in quo* to a certain other highway (leading from *C.* to *D.*) was well supported by evidence proving that the way in question led from the *terminus a quo*, viz. the way leading from *A.* to *B.* over the *locus in quo*, to a different way called *E.* and along that way into the way leading from *C.* to *D.* the *terminus ad quem*.—In pleading a public highway it is not necessary to state any *termini*.

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The evidence at the trial was, that the way in dispute led over *Brompton Heath* into a footway called *The Church Lane*, at the west side, and along that footway, into the road leading from *London* to *Fulham*.

Lord LOUGHBOROUGH, who tried the cause, thought the plea was not supported by the evidence, inasmuch as there was a variance with respect to the *terminus ad quem*, and directed the jury to find a verdict for the plaintiff; which was accordingly done.

In the last term a rule was granted to shew cause why there should not be a new trial, against which *Bond* and *Marshall* Serjts. shewed cause.

It is a rule of law necessary for the protection of property, that any one who comes on the soil of another, shall be deemed a wrong doer, till he shews distinctly that he had a right. If he enters under pretence of an easement, he must shew precisely such an easement as will warrant what he has done; he is not to enter by virtue of a fancied right, not accurately defined. In the present case, the defendants have no way over the plaintiff's close from the *Earl's Court* road to the *Fulham* road. Perhaps they may have a way partly over the plaintiff's close, and partly through the *Church Lane* to the *Fulham* road; but no man can go from the *Earl's Court* road over the *locus in quo* directly to the *Fulham* road, without committing a trespass. It is urged by the defendants that it is unnecessary to shew that the way goes out at the *terminus ad quem* stated in the plea. But if that be so, neither is it necessary to prove that it enters at the *terminus à quo* stated in the plea; and then it would follow, that evidence of a way entering the field at any one point, and going out at another, would support the prescription. If this be law, it would be improper ever to state the *termini* in pleading a prescriptive right of way, as it might tend to mislead the other party; but the mode would be to prescribe generally for a way in, through, and over the *locus in quo*, without a more exact description, and the plea of *extra viam* would be nugatory. If the defendant had recovered a verdict on this prescription, the consequence would have been, that in future the public would have had two ways over the plaintiff's close instead of one. It is evident from adjudged cases, that in pleading a right of way, the *terminus ad quem* as well as the *terminus à quo*, must be strictly proved. 2 *Leon.* 10. *Xlv.* 163. *Hib.* 189. 1 *Ventr.* 13. 2 *Kib.* 488.

Adair and *Runnington*, Serjts. on the part of the defendants argued, that as this was the case of a common public highway, it

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was sufficient that the substance of the allegation was proved, namely, that there was a right of way over the whole *locus in quo*, towards the *Fulham* road, though it might first lead into the *Church Lane*. In *Halsey's* case, *Latch*, 183. the defendant was indicted for stopping the King's highway in *Kensington*, and an exception was taken that no boundaries were set out, it not being alleged from what place to what place the way led. But it was holden sufficient, because a highway leads from sea to sea over the whole kingdom: but otherwise if it had been another common way. The cases cited on the other side were all of private ways, in describing which greater strictness is required; but in 1 *Ventris*, 13. and 2 *Keble*, 488. it was holden, that if it were found that the defendant had a way over the *locus in quo*, it was not material to the justification after verdict, whither it might lead. To the same point also is 2 *Keble*. 89.

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On this day the judges delivered their respective opinions as follow:

GOULD, J.—This case arises on pleadings of considerable length, stating that the trespass was committed in a place called *Brompton Heath*, with several variations in point of description. The defendants say, that from time whereof the memory of man is not to the contrary, there has been a common public highway, for all the liege subjects of this kingdom, to pass and repass on foot, from a certain other common public highway leading from *Knightbridge* to *Earl's Court*, in, through, over and upon the said close called *Brompton Heath*, unto a certain other common highway leading from *London* to *Fulham* and back again, in, through, and over the *locus in quo*. I understand, that at the end of this close leading towards the *Fulham* road, that is, in the line of the way, you do not immediately issue into what is called the *Fulham* road, but into another common highway called the *Church Lane*, and from thence over a very short space, you enter into that which is properly called the *Fulham* road. Now my apprehension always has been, that in cases of this sort, the intermediate spaces, either before the entrance into a field, or at the exit out of it before you reach the *terminus ad quem*, are immaterial. This is the case of a common public highway, and there have been very considerable doubts, whether in a common highway any *termini* at all need be set forth. There was a case mentioned at the bar, of an indictment for stopping a highway at *Kensington*, in which it was holden, that the way was sufficiently described, without stating from what

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place, to what place it led; and among other things, a reason was given for that opinion, because a highway runs from the sea across the whole island. But nevertheless, if a defendant will state the *termini* in his justification, he is bound to prove them. There are many instances, which must occur to every one, where things are not necessary to be alleged in pleading, yet if they be alleged, they must be proved. Such as the description of a public act of parliament; the day when the sessions were holden; and the like. So where an officer justifies under process of execution out of a court, it is unnecessary for him to state a judgment, yet if he will state it, he is bound to prove it as described. These are common cases, and many more might be adduced. The question then in the present case is, What the terms of this plea require to be proved, and whether they necessarily import that the way in dispute was *adjoining* to the *Fulham* road? Now that is not the case; the way is described to go, *in, through, over* and *along Brompton Heath, unto* the *Fulham* road. But there is an intervening space between that and the *Fulham* road. If it had been described to be *adjoining* to the *Fulham* road, I have already given my opinion as to the proof. But it is stated to lead *unto* the *Fulham* road; which, in my apprehension, is nothing more than this; a common highway which is one entire thing, leads over this field to the *Fulham* road; and so it does, notwithstanding there is an intervening piece of ground. The case cited at the bar from *Ventris* comprehends this idea. It is there said to be sufficient to state the places from which, and to which the way leads, though the mesne passages should be mistaken. It will be material to advert to ancient pleadings in justification. I find in *Rassall's Entries*, 617. b. a right of way pleaded as follows: A man was seised of a messuage in S. and prescribed for a way for all those whose estate, &c. both for horse and foot "*from the messuage to the parish church of E. and the market town of M.*" "*with all his carriages ultra clausum prædictum.*" Now it would be productive of infinite uncertainty to require an exact description of the line of the way, to say that it went so many yards to the north, then turned to the west and then to the east, in that irregular manner. Such justifications as these would then be clogged with insuperable difficulties in point of proof. And I think it would be totally unnecessary; the usage defines the way. I mention this as occurring to me from the books and pleadings; and with regard to experience, I have always understood

flood that the intermediate spaces are disregarded, both as to the approach to a field and the quitting it. It is sufficient to answer the trespass, and justify under a right to pass over the close. I therefore think this is not a material variance from the plea.

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WILSON, J.—I am of the same opinion. Where the way is a public highway, it is in no sort necessary to state either the *terminus à quo*, or the *terminus ad quem*; where it is a private way, it is necessary to state them, because private ways are given for particular purposes, and the justification must shew that they were used for those purposes. But it is different with regard to a public highway, because all his Majesty's subjects have a right to use that way, for all purposes, and at all times. The reason given in the antient cases, why a highway must be particularly described is not a very good one, namely, that it must be stated to lead to a market town, in order to shew that it is a highway. Lord Hale says, whether it be a highway or not depends much on reputation. I am therefore of opinion, that in justifying a trespass because the place in question is a highway, it is not necessary to state the places to which, and from which it leads. If that be so, the next question is, Whether those places being stated in the plea, they are sufficiently proved? With respect to that, the way in dispute is stated to be a highway leading from one highway to another highway. I think it cannot be doubted but that this is a sufficient description. But it is impossible to state the specific line of the road under that description, which can only be, that it leads from one point to another. What the line is on which the highway passes, must be a matter of evidence. The objection in this case is, that the way is stated to lead to the *Fulham* road, but that before it reaches the *Fulham* road, it goes for a little space on another highway. But I do not conceive that to be a material variance. I understand the allegation to import no more than this, namely, that there is a highway over the close, on which you may go from the *Fulham* road to the *Kensington* road; but not that the *Fulham* road joins to the close over which the highway leads. But even if that were the import of the allegation, I should have considerable doubts whether this were a variance. But clearly the allegation means no more than this; there is a highway over the close, leading from the *Fulham* road to the *Kensington* road, which I think was sufficiently proved by the evidence.

LORD LOUGHBOROUGH.—My brother Heath has informed me, that he is of the same opinion with my brothers Gould and

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Wilson.

1790. *Wilson*. I therefore certainly feel that the authority of the court ought to govern my opinion. But on the best consideration I have given the question, I have not been able to bring myself to agree with them. I still retain the opinion I first had at the trial, and think, that in all cases, where a real difference in opinion exists, it is right to avow it, and state the grounds on which we differ. What weighs with me in the present case, is the positive authority of (a) 2 *Rolle's Abridgement*, 81. in which it is said, that in an indictment for an obstruction, or nuisance near a highway, it is necessary to set out the *terminus à quo*, and the *terminus ad quem*; a case in 15 *Car. 1.* is referred to where an indictment was quashed for this reason, which was said to be a common exception, and divers indictments had been quashed on the same account. Against that authority, a case in *Latch*, 183. and some subsequent cases were cited. But that case, in my apprehension, tends rather to confirm than weaken the authority of *Rolle's Abridgement*, for it shews that a much nicer objection was allowed by all the court. It was stated in the indictment, that at *Kensington* the defendant obstructed the king's highway from *London* to *Kensington*, and the court two several times held this to be bad, because they said, the manner of describing the way excluded *Kensington*. The indictment was then drawn in a third form, and the way described to be the king's highway in *Kensington*, this was holden to be sufficient, first by *Jones* and afterwards by *Doderidge* and *Whitlock*, and the reason given is, because a highway leads from the sea through all *England*. But that reason I do not conceive to be a fair one: the obvious reason is, that a highway stated to be in a town is sufficiently certain. And in that case *Jones* distinguishes a common way, in which the *termini* must be set out, from *alta via regia*. The case in 3 *Keble*, 89. is not applicable to the present; it was of a presentment on a view by a jury, on an annoyance in a cloth fair, which the court after verdict held good. I think the case in *Andrews*, 137. before Lord Chief Justice *Lee*, was rightly determined on its own grounds. One question there was, Whether the description of the river *Thames* at *Fulham*, was sufficient without stating the places to which and from which it flowed? But it would be absurd to require abutments of navigable rivers; in that case it was holden sufficient to say the river *Thames* at *Fulham*, and both *Probyn* and *Chapple* say, it was not necessary to set out the *termini*, for the court would take notice of the river *Thames*.

(a) *Tit. Indictment*, pl. 18.

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But admitting that in an indictment for a nuisance in not repairing, it was sufficient to state a highway generally, yet it seems to me that the same rule is not to be applied to a plea in bar of an action of trespass; because every man has *prima facie* a right to exclude all others from coming over his land, and the justification must be set out with due certainty, and notice to the plaintiff of the way claimed over his soil. There may be many ways claimed, and the occupier of the field ought to know which is insisted upon; he may admit one, and deny the other; he has a right to reply *extra viam*, which he cannot do, unless the way is explained with defining the term where it commences and ends. In the case before the court, the plaintiff might have admitted the road to the *Church Lane*; he is deceived by the plea, for he knows there is no road over his field which directly terminates in the *Fulham* road. But whether the defendant was or was not obliged to describe the way so particularly, he has undertaken to do it, and has not done it truly; a way terminating in the *Church Lane*, and a way terminating in the *Fulham* road, are not only distinct, but it is physically impossible they can be the same. If the road were a line drawn from the *Knightsbridge* to the *Fulham* road, the line actually taken into the *Church Lane*, must of necessity be *extra viam*, and so *vice versa*. To state generally a right to cross a field without any given direction, seems to me so uncertain, that it is impossible to meet it with precision, either in replication, or on traverse of the plea.

Rule absolute for a new trial (a).

(a) [See also *Aspindall v. Brown*, 3 Term Rep. B. R. 265. as to pleading a public highway.]

MASON and others v. LICKBARROW and others,
in the Exchequer Chamber, in Error.

Thursday,
Feb. 11th.

See 2 Term Rep. B. R. 63.

THE defendants in the original action, having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that court was there delivered by

Where the consignee of goods becomes insolvent, the

consignor may stop them *in transitu* before the consignee gains possession. — In such case also, the consignor may stop the goods *in transitu*, though the consignee assign the bills of lading to a third party for a valuable consideration; the right of the consignor not being divested by the assignment (a).

(a) [This decision was reversed in the House of Lords, and a *Venire de novo* awarded. See *post*, vol. 2. p. 211; and 5 Term Rep. B. R. 367. On the second trial a special verdict was found, and the court of K. B. without discussing the

question anew, declared that they retained their former opinion, that the right of the consignor was divested by the assignment. See *Salomons v. Nissen*, 2 Term Rep. B. R. 674. as to fraud or notice in the assignee.]

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the delivery of the goods. When this indorsement is in blank the holder of the bill of lading may receive the goods, and his receipt will discharge the ship-master; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the ship-master; and in this respect I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? a right to receive the goods and to discharge the ship-master, as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier or a factor. Mere possession without a just title gives no property; and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. The indorsement of a bill of lading, differs from the assignment of a *chose in action*, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship board, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue if the demand is refused, is attached to the thing. The case in 1 Lord Raym. 271. was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract: and I assent to the dictum, that he might assign over his right. But the question remains, What right passes by the first indorsement, or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to take the one without redemption, and the other without the payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which, by the custom of trade, passes the whole interest in the debt so completely, that the holder of the bill for a valuable consideration, without notice, is not affected

affected even by the crime of the person from whom he received the bill.

Bills of lading differ essentially from bills of exchange in another respect.

Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt, which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do, and sometimes do not express, on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them, any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases (*a*), that the received opinion of merchants was against their being so negotiable. And unless there was a clear, established general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law, would lose its credit with the rest of the commercial world. For the immediate consequence would be, to prefer the interest of the resident factors and their creditors, to the fair claim of the foreign consignee. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit, at the hazard and expence of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must inquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to inquire into the title by which goods are sold or assigned? In the case of (*b*) *Hartop v. Hoare*, jewels deposited with a goldsmith, were

(*a*) *See v. Prescott*, 1 A.K. 245. *Fearon v. Bowyer*, *post*. (*b*) 2 Stra. 1187. 1 Will. 8.

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pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn the goods of his consignor. *Patterson v. Tash*, 2 Str. 1178. The person therefore who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet in this case, the factor might have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing, that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him; a title to the possession of the goods when they arrive. He has a safe security, if he has dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, tho' bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of doubtful character will not find it so easy to raise money at the risk of others.

The conclusions which follow from this reasoning, if it be just, are, 1st, That an order to direct the delivery of goods indorsed on a bill of lading, is not equivalent nor even analogous to the assignment of an order to pay money, by the indorsement of a bill of exchange. 2dly, That the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law: but as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3dly, That it is therefore not negotiable as a bill, but assignable; and passes such right, and no better as the person assigning had in it.

This last proposition I confirm by the consideration, that actual delivery of the goods does not of itself transfer an absolute ownership in them, without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer, that the mere indorsement can in no case convey an absolute property. It may however be said, that admitting an indorsement of a bill of lading does
not

not in all cases import a transfer of the property of the goods consigned, yet where the goods when delivered would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The whole difficulty of the case rests upon it; and I am not surprized at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of a man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act of the consignor. The first consideration, which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the *legal* right of the vendor is, and whether, with respect to him, the assignee of a bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for, may retain the possession against the vendee; not by aid of any equity, but on grounds of law. Our oldest books (a) consider the payment of the price (day not being given) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them without tender of the price. If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract, for the non-delivery. *Snee v. Prescott*, 1 *Atk.* 245. The sale is not executed before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant, was always supposed. In the variety and extent of dealing, which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being

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(a) See *Hob.* 41. and the Year Book there cited.

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delivered, may all intitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*. The cases determined in our courts of law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at *Guildhall*, after the last *Trinity* term, it appeared in evidence, that one *Bowering* had bought a cask of indigo of *Verrulez* and Co. at *Amsterdam*, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one *Tulloch*, by the appointment of *Bowering*. The bills of lading were made out, and signed by *Tulloch*, to deliver to *Bowering or order*, who immediately indorsed one of them to his correspondent in *London*, and sent it by the post. *Verrulez* having information of *Bowering's* insolvency before the ship sailed from the *Texel*, summoned *Tulloch* the ship-master before the court at *Amsterdam*, who ordered him to sign other bills of lading, to the order of *Verrulez*. Upon the arrival of the ship in *London*, the ship-master delivered the goods, according to the last bills, to the order of *Verrulez*. This case, as to the practice of merchants, deserves particular attention, for the judges of the court at *Amsterdam* are merchants of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. *Snee v. Prescott*, though in a court of equity, is professedly determined on legal grounds by Lord *Hardwicke*, who was well versed in the principles of law; and it is an authority, not only in support of the right of the owner unpaid, to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But the case of (a) *Fearon v. Bowers*, tried before Lord Chief Justice *Lee*, is

a case

(a) *FEARON v. BOWERS*, *Guildhall*, March 28, 1753, *coram Lee*, Ch. J.

Detinue against the master or captain of a ship. On the general issue pleaded, the case appeared to be, that one *Hall of Salisbury* had written to *Astell* and Co. merchant^s at *Malaga*, to send him 20 butts of olive oil, which *Astell* accordingly bought, and shipped on board the ship *Tawislock*, of which the defendant was commander, who signed three bills of lading acknowledging the receipt of the goods, to be delivered to the order of the shipper. In the bills was the usual clause, that one being performed, the other two should be void,

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a case at law, and it is to the same effect as *Snee v. Prestot*.
So also is the case of the (a) *Assignees of Burghall v. Howard*,
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The goods being thus shipped, *Apsell* sent an invoice thereof, and also one of the bills of lading to *Hall*, indorsed by *Apsell*, to deliver the contents to *Hall*; and *Apsell* at the same time sent to *Jones*, his partner in *England*, a bill of exchange drawn on *Hall* for the amount of the price of the oil; and also another of the bills of lading indorsed by *Apsell* to deliver the contents to *Jones*. The bill of exchange was presented to *Hall*, but not being paid by him it was returned protested; whereupon *Jones* on the 1st of September 1752, (a day or two after the ship arrived,) applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the custom-house, the oils could not be then delivered; and before they were delivered the plaintiff on the 3d of September produced the bill of lading sent to *Hall*, with an indorsement thereon by *Hall* to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to *Hall* 200*l*.—Notwithstanding this, the defendant afterwards delivered the oils to *Jones*, and took his receipt for them on the back of the bill of lading.

For the plaintiff it was contended, that the bill of lading indorsed to *Hall*, and by him to the plaintiff, had fixed the property of the goods in the plaintiff. That the consignee of a bill of lading has such a property that he may assign it over, *Ewans v. Martlett*, 1 Lord Raym. 271. There it is laid down, if goods are by bill of lading consigned to *A*, *A* is the owner and must bring the action against the master of the ship if they are lost: but if the bill be special to deliver to *A* for the use of *B*, *B* ought to bring the action; but if the bill be general, and the invoice only shews they are upon the account of *B*, *A* ought to bring the action, for the property is in him, and *B* has only a trust, *per totam curiam*. *Holt*, C. J. said, the consignee of a bill of lading has such a property that he may assign it over; and *Shawver* said, it had been adjudged so in the Exchequer. It has been farther insisted, that the plaintiff had advanced the 200*l*. on the credit of the bill of lading, in the course of trade, and no objection was made that the oils had not been paid for; for that would prove too much, namely, that the bill of lading was not negotiable. And the indorsement was compared to the indorsement of a bill of exchange, which is good, though the bill originally was obtained by fraud. Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor, if not paid for the goods, had a right by any means that he could, to stop their coming to the hands of the consignee till paid for. One of the witnesses said, he had a like case before the chancellor, who upon that occasion said, he thought the consignor had a right to get the goods in such a case back into his hands in any way so as he did not steal them.

It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain, and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either with a receipt on the bill of lading, and was not obliged to look into the invoice or consider the merits of the different claims.

Lee, Ch. J. in summing up the evidence, said, that to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement; that the invoice strengthens that right by shewing a farther intention to transfer the property. But it appeared in this case, that *Jones* had the other bill of lading to eas a curb on *Hall*, who in fact had never paid for the goods. And it appeared by the evidence, that according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury therefore were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did.

(a) *Assignees of BURGHALL a bankrupt v. HOWARD*.

At Guildhall sittings after Hil. 32 Geo. 2. coram Lord Mansf. Id.

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before Lord *Mansfield*. The right of the consignor to stop the goods is here considered as a legal right. It will make no difference in the case, whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases cited in the course of the argument, the right of the consignor to stop the goods is admitted as against the consignee. But it is contended, that the right ceases as against a person claiming under the consignee for a valuable consideration, and without notice that the price is unpaid. To support this position it is necessary to maintain that the right of the consignor is not a perfect legal right in the thing itself, but that it is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith and unconscionable. If the consignor had no legal title, the question between him and the *bonâ fide* purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods *in transitu* as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determinations been treated as a mere equitable claim in cases between him and the consignee. To examine the force of this assertion, it is necessary to take a review of the several determinations:

The first is the case of *Wright v. Campbell*, 4 Burr. 2046. on which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case

One *Burghall* at London gave an order to *Bromley* at Liverpool to send him a quantity of cheese. *Bromley* accordingly shipped a ton of cheese on board a ship there, whereof *Howard* the defendant was master, who signed a bill of lading to deliver it in good condition to *Burghall* in London. The ship arrived in the *Thames*, but *Burghall* having become a bankrupt, the defendant was ordered on behalf of *Bromley* not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned; whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as a carrier.

Lord *Mansfield* was of opinion that the plaintiffs had no foundation to recover, and said, he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property.

The plaintiffs were nonsuited.

was reserved by the judge at *nisi prius*, on the argument of which the court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing in the report of it, an opinion of Lord *Mansfield*, that the right of the consignor to stop the goods, cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord *Mansfield* is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes; 1st, That as against the factor, the owner may retain the goods; 2dly, That a person into whose hands the factor has passed the consignment with notice, is exactly in the same situation with the factor himself; 3dly, That a *bonâ fide* purchaser from the factor, shall have a right to the delivery of the goods, because they were sold *bonâ fide*, and by the owner's own authority. If the owner of the goods entrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally, if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the orders of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the court, if the plaintiffs in the action could maintain, that *Turings and Co.* had sold to them by the intervention of *Freeman*, and were therefore bound *ex contractu* to deliver the goods. Lord *Mansfield's* opinion upon the direct question of the right of the consignor to stop the goods against a third party, who has obtained an indorsement of the bill of lading, is quoted in favour of the consignor, as delivered in two cases at *nisi prius*; (a) *Savignac v. Cuff* in 1778, and (b) *Stokes v. La Riviere* in 1785. Observations are made on these cases, that they were governed by particular circumstances; and undoubtedly when there is not an accurate and agreed state of them, no great stress can be laid on the authority. The case of (c) *Caldwell v.*

(a) 2 Term Rep. B. R. 66. (b) 2 Term Rep. B. R. 75. (c) 1 Term Rep. B. R. 205.

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Ball is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. The case of (a) *Hibbert v. Carter*, was also cited on the same side, not as having decided any question upon the consignor's right to stop the goods, but as establishing a position, that by the indorsement of the bill of lading, the property was so completely transferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and undoubtedly if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just; for the property of the goods, and the risk, would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the *West Indies*, and all countries where the balance of trade is in favour of *England*, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expence of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. That case therefore has no application to the present question. And from all the cases that have been collected, it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods *in transitu*, before the case now brought before this court. When a point in law which is of general concern in the daily business of the world, is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion, upon loose reports of incidental arguments. The rule therefore which the court is to lay down in this case, will have the effect, not to disturb, but to settle the notions of the commercial part of this country, on a point of very great importance, as it regards the security and good faith of their transactions. For these reasons, we think the judgment of the court of King's Bench ought to be reversed.

(a) 1 Term Rep. B. R. 745.

Mr. Justice Heath was unable to attend during the whole of this term.

THE END OF HILARY TERM.

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ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Thirtieth Year of the Reign of GEORGE III.

NOONE v. SMITH.

Monday,
April 26th.

A Rule having been granted on the motion of *Watson*, Serjt. to shew cause why the defendant should not plead several matters, viz. *Non assumpsit* as to part, *tender* as to the residue, and a set-off;

A plea of tender may be pleaded, after a judge's order for time to plead has been obtained.

Rooke, Serjt. shewed for cause, that the defendant had obtained four several orders of a judge for *time to plead*, between the 9th of *February* last and the 9th of *April*; that after time to plead being given (which was always on terms of pleading issuably, &c.) the defendant could not plead a tender without special leave to plead it, because, strictly speaking, a plea of tender was in the nature of a plea in abatement, and not an issuable plea; that this was established as the practice of the court in the case of *Nottle v. Hervey*, *East*. 27 *Geo.* 3.

Watson for the rule, urged, that the practice of the King's Bench was, to allow a plea of tender after time to plead granted; that the only ground of objection was, that it was formerly not considered as an issuable plea; but that in truth it was both an honest and an issuable plea, as it went to take away the plaintiff's right of action, and bring the merits fairly before the court.

On this day Lord LOUGHBOROUGH declared, that as the practice of the King's Bench differed from the practice of this court, and as a plea of tender was a fair and just plea, it would be right to alter the practice of this court in conformity to that of

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the King's Bench, and to permit the defendant to plead a tender after a judge's order for time to plead. The rule was therefore made absolute; but it was thought reasonable that the defendant should pay the costs of shewing cause, as the court had laid down a rule of practice different from the last determination on the subject.

GOULD, J. observed, that though the first case in *Barnes* on this subject (a) 10 Geo. 2. was an authority to shew that a plea of tender could not be pleaded after obtaining a judge's order, yet there were two subsequent determinations in the same book, one in (b) 25 Geo. 2. and the other in (c) 26 & 27 Geo. 2. which were agreeable to the rule which the court now laid down.

(a) *Davenport v. Barritt*, 1 *Barnes*, 243. 8vo. 337. 4to.

(b) *Wksley v. Harrison*, 2 *Barnes*, 293. 8vo. 360. 4to.

(c) *Pitfield v. Morey*, 2 *Barnes*, 296. 8vo. 362. 4to. See 1 *Burr.* 59. 1 *Crompt. Prac.* 155. *Impey's Prac. B. R.* 191. *Id. C. B.* 162.

Monday,
May 10th.

A power granted by charter, to a company exercising a particular trade in a certain place to make bye-laws for the government of all persons exercising that trade in that place, enables it to make bye-laws binding on persons so exercising the trade, who are not members of the company as well as those who are.

The BUTCHERS' COMPANY v. MOREY.

THIS was an action of debt for 8 l. The declaration stated,
 " That King Geo. 2. by letters patent bearing date the 10th
 " of October, in the 23d year of his reign, ordained that all and
 " singular the freemen of the society of the art or mystery of
 " butchers, within the city of London, and every other person who
 " then used or exercised, or should thereafter use or exercise the
 " art and mystery of butchers within the city of London, the
 " liberties and suburbs thereof, and within any other place what-
 " soever within two miles from the said city of London, by
 " whatsoever name such society was called or known, and their
 " successors for ever thereafter might and should be, by virtue
 " of the said patent, one body corporate and politic, by the
 " name of the master, wardens, and commonalty of the art or
 " mystery of butchers of the city of London," &c. After other
 particulars, the power of the company to make bye-laws was
 thus stated; " That they should have full power and authority to
 " appoint, from time to time, such reasonable ordinances, decrees,
 " orders, and constitutions in writing, which to them or the ma-
 " jor part of them, &c. should seem to be good, wholesome, pro-
 " fitable, honest, and necessary for the good order and government
 " of the master, wardens, &c. and of all other persons for the time
 " being, exercising or using the said art or mystery of butchers,
 " or exposing flesh to sale within the city of London, and for de-
 " claring in what manner the said master, &c. and all persons using
 " the

“ *the art, &c. or exposing flesh to sale* within the said city, and
 “ within two miles thereof, in their offices, servants, and trades
 “ should behave, bear, and use themselves for the public good and
 “ common benefit of the said master, wardens, &c. and in all cases
 “ and things whatsoever, touching or in what manner soever con-
 “ cerning the art or mystery, &c. and as often as they should
 “ make, constitute, &c. such institutions, ordinances, orders, and
 “ constitutions, should make, limit, and provide such pains, pe-
 “ nalties, and punishments, by imprisonment of the body, or by
 “ fines and forfeiture, or by either of them, against and upon *all*
 “ offenders against such laws, as to the said master and wardens,
 “ &c. should seem necessary, &c.” It was also stated that the
 said fines and forfeitures were to be recovered and levied to the
 use of the said master, and wardens, &c. “ which said letters patent
 “ the said freemen of the society of the art or mystery of butchers,
 “ and *the said other persons therein named, and thereby meant to be*
 “ *incorporated afterwards, &c. accepted, &c.*” The bye-law in
 question was as follows: “ That whereas the Lord’s day, com-
 “ monly called *Sunday*, was by Christians to be kept holy, it was
 “ ordained that *no person* then using, or who should thereafter use
 “ the said art, &c. and should inhabit and dwell within the said
 “ city or suburbs thereof, or within two miles of the same city,
 “ should keep open any shop or *offer to sale* any fresh meat upon
 “ the said day; and that *every such person* who should offend,
 “ contrary to any part of that ordinance, should forfeit and pay to
 “ the said master, wardens, &c. for the first time 20 s. for the se-
 “ cond time 40 s. and for every time afterwards 3 l. And that it
 “ was farther ordained, that all the penalties, forfeitures, and
 “ sums of money to be forfeited, should be to the use of the master,
 “ wardens, &c. and on refusal should be recovered by action of
 “ debt, &c.” of which said bye-law the defendant had notice. It
 was then averred that the defendant, after the making of the said law,
 and before committing the several offences thereafter mentioned,
 had been and still was a butcher, and then used and still did use the
 art, &c. within the space of two miles from the said city, in *Mint-*
Street, &c.; that the defendant did on the 29th of *January 1786*, the
 same being *Sunday*, in a certain shop of him the said defendant, &c.
 sell divers large quantities of flesh, to wit, thirty pounds weight of
 pork, &c. to divers persons unknown, contrary to the form and effect
 of the said order in that behalf made as aforesaid, whereby he for-
 feited the sum of 20 s. &c. The other offences were stated in a
 similar manner, and the declaration concluded in the common form.

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Plea *Nil debet*. The cause was tried at *Guildhall*, at the sittings after last *Michaelmas* term, and a verdict found for the plaintiffs. A rule having been obtained for arresting the judgment, *Adair, Le Blanc, and Watson, Serjts.* shewed cause. There is no ground for arresting the judgment in this case, the bye-law not being made for the improper restraint of trade, but the due regulation of it consonant to the law of the land, 29 *Car. 2. c. 7*. Though the charter would not have been good without acceptance, 2 *Brownl.* 100. yet it is here expressly stated that the "*freemen and the said other persons accepted it.*" The majority of persons exercising the trade of butchers, having accepted it, their acceptance must be taken to be the acceptance of all, and to bind their successors as well as themselves. So in the (a) *Chester* case, the former inhabitants being incorporated by charter, they who afterwards became inhabitants were considered to be under the same government. It is a clear principle, that where corporations are established for general local government, the laws made by them, if not beyond the limits of their jurisdiction, bind all persons, as well those who are within those limits at the time of making the laws, as those who become so in future. These laws being once passed, continue in force till they are repealed. If this be true in cases of general local government, it must also be true in those of particular government; the only difference is, that in one instance the limits of the government are more extensive than in the other. In (b) *Cudden v. Eastwick*, it is laid down, that "a corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers." In (c) *Pierce v. Bartrum*, a bye-law of the corporation of *Exeter*, to prohibit butchers and other persons from slaughtering any beast within the walls of the city, was holden to bind the defendant though not a member of the corporation, upon the principle, that whoever comes to reside in any place, is subject for the time being to the local jurisdiction of that place. And though in (d) *Franklin v. Green*, a bye-law of the corporation of butchers, merely respecting the manner of preparing a particular sort of meat, was holden not to bind strangers, yet it is there said, that the law "would have been good to bind strangers, if made to suppress fraud or any other general inconvenience." Now there cannot be a greater general inconvenience than the public profanation of the Lord's day.

(a) *The King v. Amery*, 1 *Term Rep. B. R.* 5-5.

(b) 1 *Salk.* 192.

(c) *Corp.* 263.

(d) 1 *Bulstr.* 11. See also 1 *Roll. Abr.* 363. pl. 9. 5 *Co.* 63. b. *Hob.* 212. 1 *Lev.* 15. *Hardr.* 56.

Bond

Bond and Lawrence, Serjts. contra. The company of butchers cannot make laws to bind those who are not members of the company. No corporation can make bye-laws binding on strangers, without the authority of parliament. There can be no charter to establish a power of making laws, more extensive than the incorporation itself. The king cannot grant such a charter; and here the defendant is not a member of the company. As to the case of the corporation of *Exeter*, though the general corporation of a large town may have power to bind strangers by its local regulations, yet it does not follow that a particular corporation within such a town has the same power. This distinction will clearly appear from attending to the nature of general corporations, the purposes for which they were established, and the large powers granted to them at their first institution, in every country of Europe; *Robertson's Hist. Charles V. vol. 1. p. 296. 301. note.* The same distinction is taken in the case of the (a) *Trinity House v. Crispin*. So also in (b) *Dedwell v. The University of Oxford*, the court were inclined to hold that a bye-law of the university did not extend to the inhabitants of the town, and in the (c) *Mayor of Guildford v. Clarke*, it was holden to be an incurable objection to the declaration, that it stated a bye-law of the corporation to be, "That if any inhabitants should be duly elected to the office of bailiff and refuse to take it upon him, he should forfeit 20*l.* because the corporation could not make bye-laws to bind all the inhabitants of the town, but only the freemen or members of the corporation." On the same principle likewise are *Bro. Abr. tit. Custom, pl. 32. Ibid. tit. Prescription, pl. 40.*

Adair in reply, did not dispute the position, that no corporation could make bye-laws to bind all persons whatever, without the authority of the legislature; but argued that the distinction between general corporations like *London* or *Exeter*, and particular guilds or fraternities was this, that a general corporation could make bye-laws binding on all persons within its local limits, whatever trade they might carry on, and whatever might be the subject of such bye-laws; but that a particular guild or fraternity could only make regulations respecting its particular trade. The company of butchers could not restrain the company of weavers from exercising their trade on a *Sunday*, because the regulation of the latter was not the object of the incorporation of the former. But that object was evidently the regulation

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(a) *Sir Thomas Jones, 145.*(b) *2 Vent. 33.*(c) *2 Vent. 247.*

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Lord LOUGHBOROUGH.—I can see no good ground of objection to this bye-law itself, nor to the subject matter of it. It is a regulation made in affirmance of the general statute law of the kingdom, which prohibits buying and selling on the Lord's day. The butchers' company have affixed a penalty on persons exercising the trade of butchers, who shall sell meat on that day, and have increased the penalty in proportion to the first, second, and third offence. The objection raised is, that the authority by which these regulations are made, is defective; because, it is contended, it can only extend to those persons who are members of the company. It is also said, that though large corporations, and those which are established for the general purposes of local government have a right to bind by their laws all persons within the limits of their jurisdiction, yet that a private particular corporation like the butchers' company, can have no right to affect any person but their own members. But no case was cited which supports this position. I agree that strangers and they who are not concerned in the trade, for the regulation of which the company was established, cannot be bound by the laws of that company: if this bye-law had inflicted a penalty on the *buyers* of meat, I should hold it to be clearly bad, because they are perfect strangers. It is an object of public policy that the exercise of certain trades should be under the regulations of particular bodies; charters have various effects according to the subjects of them. Some are granted with exclusive rights to particular persons, others contain rules which only affect certain members. On principles of general policy the object of the law is, that by means of charters of this kind, the power of carrying on trade, of making up goods, of exposing them to sale, and the like, should belong to the local government of particular districts. For these purposes, certain restraints are imposed, since every regulation is more or less a restraint. Now if in the present instance, the butchers' company had no power to regulate their own trade, so as to make laws binding on persons who exercise that trade, as well those who were not members of the company, as those who were; the consequence would be, that the beneficial purpose of the charter would be entirely defeated, and the only persons injured by the restraint would be the members themselves. For then

then all other persons might carry on the trade without controul, while the members of the company would be excluded, and the whole business of supplying meat on *Sundays*, would fall into the hands of butchers not of the company. But this would be contrary to the intent of the charter. I think this case comes within the principle of the *Exeter* case, and therefore that the judgment ought not to be arrested.

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GOULD, J.—The only difference between this and the *Exeter* case is, that there the regulations were confined to the city of *Exeter*, but here the limits extend beyond the boundaries of the city of *London*. But where a charter is granted to a company in affirmance of an act of parliament, made for the purpose of common decency and piety, it is fit that the limits of the charter should be as extensive as the mischief to be remedied. If the charter were confined to the city itself, persons who pay no regard to the law might easily go out of the limits prescribed and buy meat; by which means the purpose of the charter would be defeated. I therefore think these are reasonable limits, and see no reason to object to the validity of the bye-law.

HEATH, J.—I am of the same opinion. The bye-law seems to me to be a good one, and within the authority given by the charter to the company. Nor is it contrary to the case in 1 *Bulst.* 11. where it is said, the bye-law had been good, if made to suppress any general inconvenience. And that case may well be reconciled with 2 *Ventr.* 33. which was on a question, Whether a bye-law of the university of *Oxford* was good, which restrained all persons, townsmen as well as students, from walking in the streets after nine o'clock at night: a prohibition was granted, and one of the judges observed, that though it might be proper to restrain scholars of the university from being in the streets after that hour, yet there was no reason why the townsmen should be under the same restraint. Now this agrees with the doctrine in *Bulstrode*, for so far from suppressing a general inconvenience, it would be highly inconvenient, if the inhabitants of a town were prevented from walking in the streets after nine o'clock, whatever may be the case in regard to the students of an university.

WILSON, J.—I am of the same opinion. I think it a good bye-law, and that no objection can be made to the subject matter of it. The same prohibition is established all *England* over by act of parliament. But it was said, that the charter could give no such power to the company. If this be true, the king had no

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right to grant such a charter, which expressly gives a power to bind not only members of the company, but likewise all persons exercising the trade in *London*, and within two miles round. The question then is, Whether the king could give this power? for the object of its exertion is admitted to be a proper one. Now is there any authority denying the king to have the right? It is allowed that general corporations have such a power by their charters. But by what authority? Who could give them that power but the king? Then if the king can grant a power of this kind to general corporations, What shall prevent him from granting it to particular and private corporations?

Rule discharged (a).

(a) [For the cases respecting bye-laws made by public companies, and what bye-law is considered only as a regulation, and what as a restraint of trade, see *Willa's Rep.* 388. Mr. Durnford's note (b).]

Saturday,
May 13th.

THRALE, COWPER, and LAWRENCE, Executors and Trustees of CALEB LOMAX Esq. v. The Bishop of LONDON, FRANCIS HENRY BARKER, Clerk, and EDWARD BARKER Esq.

In *quare impedit*, the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar, in deducing which several incidental points are also stated; the plaintiff in the replication sets forth essential matter which, if true, would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but traverses the matter of inducement which precedes it. This rejoinder is good, and may well pass by the traverse in the replication, that traverse being an immaterial one. In pleading a right in co-parceners to present to an advowson by turns, it is good to state that such right arose because they did not agree to present: [which is synonymous to saying they could not agree.]

QUARE Impedit. The declaration stated that the defendants were summoned to answer the plaintiffs, executors and devisees in trust named in the will of *Caleb Lomax* Esq. deceased, of a plea that they permit them to present a fit person to the *Vicarage of St. Stephen's near St. Alban's*, which is vacant, &c. That the said *Caleb Lomax* was in his life-time seised in fee of the advowson in gross of the said vicarage; that he presented one *Daniel Bellamy*, his clerk, who was admitted, instituted, and inducted into the same, in the time of peace, in the time of our late sovereign lord King *George 2.* &c.; that the said *Caleb* being so seised, he devised the said advowson to the said plaintiffs until his son *Caleb Lomax* should attain the age of 25 years, or should die, which should first happen, with remainders over: that *Caleb Lomax* the father died so seised, without altering or revoking his will, his son being alive and under 25 years, whereby the plaintiffs became seised of the said advowson; that being so seised the vicarage aforesaid became vacant by the death of the said *Daniel Bellamy*, and is yet vacant: that *Caleb Lomax* the son is living

and

and under the age of 25 years, that is to say of the age of 22 years. By reason whereof it belonged and still belongs to the plaintiffs to present a fit person to the said vicarage. And the defendants unjustly hindered, &c. 1790.

THRALE
v.
The Bishop
of LONDON.

The Bishop pleaded the usual plea, that he neither had nor claimed any thing in the said vicarage, but the admission, institution, and induction, &c. as ordinary, &c.

Francis Henry Barker, clerk, pleaded also as usual, that he did not hinder the plaintiffs from presenting, &c.

The defendant *Edward Barker*, pleaded first, " That one
" *John Ellis* Esq. deceased, was in his life-time seised of the said
" advowson of the said vicarage in the said declaration mentioned,
" in gross by itself, as of fee and right, and being so thereof seised,
" he the said *John Ellis* in his life-time, presented to the said
" vicarage being then vacant, *Thomas Perkins* his clerk, who on
" that presentation was admitted, instituted, and inducted into the
" said vicarage, in the time of peace, in the time of his late ma-
" jesty *Charles the Second*, late king of *England*, and became in-
" cumbent thereof; and the said *Thomas Perkins* so being such
" incumbent, and the said *John Ellis* being so seised of the said
" advowson as aforesaid, he the said *John Ellis* afterwards, to wit,
" on the 30th day of *June*, in the year of our Lord 1680, at the
" parish aforesaid, made his last will and testament in writing, ex-
" ecuted and attested so as to pass his real estate, and thereby
" devised the said advowson unto his then wife *Rebecca*; to hold
" the same to the said *Rebecca*, and her assigns for her life, and after
" her decease, he devised the same unto his second son *Thomas*
" *Ellis*, and to the heirs male of his body lawfully to be begotten,
" with divers remainders over in default of such issue, in the said
" will mentioned: and the said *John Ellis*, afterwards to wit, on
" the same day and year aforesaid, at the parish aforesaid, died so
" seised of the said advowson as aforesaid, upon whose death, the
" said *Rebecca* became and was seised of and in the said advowson,
" in gross by itself, as of freehold and right for her life, the se-
" veral remainders thereof respectively belonging as in the said
" will is for that purpose limited and declared; and the said
" *Rebecca* being so thereof seised, and the several remainders be-
" longing as aforesaid, the said *Rebecca* afterwards to wit, on the
" 1st day of *June* in the year of our Lord 1682, at the parish afore-
" said died so seised of and in the said advowson; upon whose
" death the said *Thomas Ellis* became and was seised of and in the
" said advowson, in gross by itself, to him and the heirs male of
" his

John Ellis
seised in fee
of the ad-
vowson,

presented
Thomas Per-
kins his
clerk,

devised to
Rebecca his
wife for life,
remainder
to his son
Thomas Ellis
in tail male.

Death of
John Ellis.

Rebecca the
wife seised
for her life.

Her death.

Thomas Ellis
seised in tail
male,

1790.

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suffered a
common re-
covery of
the advow-
son,

“ his body lawfully to be begotten, the further remainders there-
“ of, belonging as aforesaid, by virtue of the devise aforesaid : and
“ the said *Thomas Ellis* being so seised thereof, afterwards to wit, on
“ the 28th day of *October*, in the second year of the reign of his
“ late majesty *James* the Second, late king of *England, &c.* at the
“ parish aforesaid, in the said county of *Hertsford*, by a certain in-
“ denture then and there made, between the said *Thomas Ellis* of
“ the first part ; *John Dod*, gent. and *John Reeve*, gent. of the
“ second part ; and *William Muffon*, citizen and barber chirurgion
“ of *London* of the third part ; and duly inrolled of record in the
“ high court of Chancery, of his said late majesty king *Jam*
“ the Second, at *Westminster*, in the county of *Middlesex*, within
“ six months after the making thereof, according to the form of
“ the statute in that case made and provided, (one part of which
“ said indenture sealed with the seal of the said *Thomas Ellis*, the
“ said *Edward Barker* brings now here into court, the date whereof
“ is the day and year last aforesaid,) the said *Thomas Ellis*, for and
“ in consideration of a certain sum of money to him in hand paid
“ by the said *John Dod* and *John Reeve*, bargained and sold the
“ said advowson to the said *John Dod*, and *John Reeve*, and their
“ heirs, to hold the same to the said *John Dod*, and *John Reeve* and
“ their heirs, as by the same indenture more fully appears ; by virtue
“ of which said indenture, the said *John Dod*, and *John Reeve*,
“ became and were seised of the said advowson, in gross by itself,
“ as of fee and right : and the said *John Dod*, and *John Reeve*,
“ being so seised thereof, the said *William Muffon*, afterwards to
“ wit, on the octave of *St. Martin*, in the term of *St. Michael*,
“ in the 2d year of the reign of his said late majesty King *James*
“ the Second, in the court of his said late majesty of the bench,
“ impleaded the said *John Dod*, and *John Reeve*, then tenants of
“ the freehold of the said advowson, in a plea of land of the said
“ advowson, by a writ of our said lord the king of entry *sur disseisin*
“ *en le poſt*, then returnable in the same court, and duly returned ;
“ and the said *William Muffon*, then duly appearing in the said
“ court, the aforesaid *John Dod*, and *John Reeve*, in the court
“ of the said late King *James* the Second, of the Bench at *West-*
“ *minster*, at the return of the said writ, came and vouched thereof
“ to warranty the said *Thomas Ellis*, who was then present in the
“ same court, who in his proper person freely then and there war-
“ ranted to them the said advowson, and vouched thereof to war-
“ ranty *John Wheeler*, who was then and there likewise present in
“ the said court, in his proper person, and freely warranted to
“ him the said *Thomas Ellis* the said advowson : and thereupon in
“ the

“ the same court, before Sir *Henry Beddingfield*, knight, and his
 “ companions then justices of the said late King *James* the Second,
 “ of the bench aforesaid, in the same term of St. *Michael*, such
 “ proceedings were had, that it was considered by the same court,
 “ that the said *William Muffon* should recover his seisin against the
 “ said *John Dod* and *John Reeve*, of the advowson aforesaid, and
 “ that the said *John Dod* and *John Reeve* should have of the
 “ land of the said *Thomas*, to the value, &c. and that the said
 “ *Thomas* should further have of the land of the said *John Wheeler*,
 “ to the value, &c. and that the said *John Wheeler* should be in
 “ mercy, &c. whereupon the said *William Muffon* prayed the writ
 “ of the said late King *James* the Second, to be directed to the
 “ then sheriff of the county of *Hertford*, returnable immediately,
 “ to cause seisin of the said advowson to be delivered to him, which
 “ writ was granted to him returnable in the same court, and the
 “ said sheriff afterwards in the same term returned, that he de-
 “ livered seisin thereof to the said *William Muffon*, as by the said
 “ writ he was commanded, as by the record of the said judgment
 “ and proceedings in the said court of our said lord the now king
 “ of the bench, here remaining, more fully appears. Which said
 “ recovery in form aforesaid had, was had to the use of the said
 “ *Thomas Ellis*, and his heirs. By virtue of which said recovery,
 “ the said *Thomas Ellis* became and was seised of the said advow-
 “ son, in gross by itself, as of fee and right; and being so seised
 “ thereof, afterwards to wit, in *Hilary* term, in the second year of
 “ the reign of their late majesties *William & Mary*, late king and
 “ queen of *England*, &c.; in the court of their said late majesties,
 “ before *Henry Pollexfen*, *John Powell*, *Thomas Rokeby*, and *Peyton*
 “ *Ventries*, then their late majesties justices, and other loving sub-
 “ jects of their said late majesties then present, a certain fine was
 “ levied between *Henry Killigrew*, Esq. plaintiff, and the said *Tho-*
 “ *mas Ellis* and *Mary* his wife deforceants, of the said advowson,
 “ whereof a plea of covenant had been summoned between them
 “ in the same court, namely, that the said *Thomas Ellis* and *Mary*
 “ his wife, acknowledged the said advowson to be the right of the
 “ said *Henry Killigrew*, as the same which the said *Henry Killigrew*,
 “ had of the gift of the said *Thomas Ellis* and *Mary* his wife, and
 “ they remitted and quit claimed the same from the said *Thomas*
 “ *Ellis* and *Mary* his wife and their heirs, to the said *Henry Killi-*
 “ *grew* and his heirs; and the said *Thomas Ellis* and *Mary* his
 “ wife, granted for themselves and the heirs of the said *Thomas*,
 “ that they would warrant to the said *Henry Killigrew* and his
 “ heirs

1790.

THRALE
 v.
 The Bishop
 of LONDON.

to the use of
 himself in
 fee.

A fine levied
 by *Thomas*
Ellis and his
 wife,

1790. “ heirs the said advowson against them the said *Thomas Ellis* and
 “ *Mary* and the heirs of the said *Thomas*, for ever ; as by the said
 “ fine remaining of record in the court of our lord the now king,
 “ of the bench here, more fully appears : Which said fine so as
 “ afore said, had and levied, was had and levied to the use of the
 “ said *Henry Killigrew*, and his heirs for ever : whereby the said
 “ *Henry Killigrew* became and was seised of and in the said advow-
 “ son, in gross by itself as of fee and right. And the said *Henry*
 “ *Killigrew* being so seised thereof as afore said, the said vicarage
 “ afterwards and in the life-time of the said *Henry Killigrew*, at the
 “ parish afore said, in the said county of *Hertford*, to wit, on the
 “ first day of *May* in the year of the Lord 1693, became vacant
 “ by the death of the said *Thomas Perkins*, whereby it then and
 “ there belonged to the said *Henry Killigrew*, to present a fit per-
 “ son to the said vicarage ; but the said vicarage continued and
 “ remained so vacant for the space of one year and the half of an-
 “ other year, next after the death of the said *Thomas Perkins* ; by
 “ reason whereof, and by force of the royal prerogative, the right
 “ of presenting a fit person to the said vicarage for that turn de-
 “ volved upon his said late majesty King *William* the Third, then
 “ being king of *England* ; whereupon his said late majesty King
 “ *William* the Third, afterwards to wit, on the 29th day of *March*,
 “ in the year of our Lord 1695, presented to the said vicarage
 “ *John Fothergill* his clerk, who on that presentation was admitted,
 “ instituted, and inducted into the same in the time of his said late
 “ majesty King *William* the Third, and became incumbent there-
 “ of ; and the said *John Fothergill*, so being such incumbent, and
 “ the said *Henry Killigrew* being so seised of the said advowson,
 “ afterwards to wit, on the 8th day of *December* in the year of
 “ our Lord 1704, at the parish afore said, in the said county of
 “ *Hertford*, he the said *Henry Killigrew*, made his last will and
 “ testament in writing executed and attested so as to pass his real
 “ estate, and thereby devised the said advowson to *Lucy Killigrew*
 “ his wife for her life, and afterwards to wit, on the 20th day
 “ of *December*, in the year of our Lord 1712, at the parish afore-
 “ said, in the said county of *Hertford*, died seised of the said ad-
 “ vowson as afore said, without leaving issue male of his body ;
 “ upon whose death the said *Lucy* by virtue of the said last men-
 “ tioned devise, became and was seised of the said advowson, in
 “ gross by itself as of freehold and right for her life ; and the re-
 “ version thereof then descended and came to the three daughters
 “ of the said *Henry Killigrew* to wit, to *Lucy Killigrew* the eldest
 “ daughter,

THRALE
v
The Bishop
of LONDON.

to the use of
*Henry Killi-
grew* in fee.

Church vac-
cant by the
death of
Perkins.

Lapse to
William 3^d.

who present-
ed *John F.-
thergill*.

Advowson
devised by.
*Henry Killi-
grew*,
to *Lucy* his
wife for life.

Death of
*Henry Killi-
grew* with-
out issue
male.
Lucy tenant
for life.
Reversion
descended to
the three
daughters of

“ daughter, *Mary Killigrew* the second daughter, and *Judith Killigrew* the youngest daughter of the said *Henry Killigrew*, as the daughters and co-heirs of the said *Henry Killigrew*; whereby the said *Lucy, Mary, and Judith*, their daughters, then and there became and were seised of the said reversion of the said advowson, in gross by itself as of fee and right, in coparcenary: and the said *Lucy Killigrew* the mother being so seised of the said advowson for her life, and the reversion thereof belonging to the said *Lucy, Mary, and Judith* the daughters of the said *Henry Killigrew*, and their heirs in form aforesaid, the said *Mary* afterwards to wit, on the 3d day of *February*, in the year of our Lord 1726, at the parish aforesaid, took to husband *Edward Barker Esq.* the late grandfather of the said *Edward Barker*, the now defendant; whereby the said *Edward Barker* the grandfather, and the said *Mary*, in right of the said *Mary*, became and were seised of and in the said reversion of the said *Mary*, of and in her said one-third part of the said advowson, in gross by itself, as of fee and right; and being so thereof seised, and the said *Lucy Killigrew* the mother, being so seised of the whole of the said advowson, in gross by itself, as of freehold and right for her life, the said vicarage afterwards and in the life-time of the said *Lucy Killigrew* the mother, to wit, on the first day of *October*, in the year of our Lord 1728, became vacant by the death of the said *John Fothergill*; whereby it then and there belonged to the said *Lucy Killigrew* the mother to present a fit person to the said vicarage, but one *Caleb Lomax Esq.* then and there usurping upon the title of the said *Lucy Killigrew* the mother, presented one *John Romney* his clerk to the said vicarage so being vacant, who on that presentation was admitted, instituted, and inducted into the same, in the time of his late majesty *George* the Second, late king of *Great Britain*, and became incumbent thereof: and the said *John Romney* so being such incumbent, and the said *Lucy Killigrew* the mother so being seised of the said advowson for her life, afterwards to wit, on the 10th day of *September*, in the year of our Lord 1729, at the parish aforesaid, in the said county of *Hertford*, the said *Lucy Killigrew* the mother, died so seised of such her said estate, upon whose death one *James Cook*, who had then lately intermarried with the said *Lucy* the daughter, the eldest of the said three daughters of the said *Henry Killigrew*, became and was seised in right of the said *Lucy*, of and in one third part of the said

1790.

THRALE v.

The Bishop of London.
Henry Killigrew in coparcenary with *Lucy, Mary, and Judith*.

Mary the daughter married *Edward Barker* grandfather of the defendant.

Church vacant by the death of *Fothergill*.

Caleb Lomax usurping on *Lucy Killigrew* the mother, presented *John Romney*.

Death of *Lucy Killigrew* the mother.

James Cook, husband of *Lucy* the eldest daughter, seised in her right of

one third of the advowson.

“ advowson,

1790.

THRALE
v.The Bishop
of LONDON.*Edward**Barker* the

grandfather,

and *Mary*

his wife in

her right,

seised of an-

other third.

*Judith Kil-**ligrew* seised

of the re-

maining

third.

Church va-

cant by the

resignation

of *Romney*.

First avoid-

ance after

the death of

Lucy the

mother.

Because

*James Cook,**Edward**Barker* the

grandfather,

and *Mary*

his wife, and

*Judith Kil-**ligrew*, did

not agree to

present; it

belonged

to *James**Cook* to pre-

sent.

George 2.

usurping on

him pre-

sented *Rom-**ney*.*Judith Kil-**ligrew* de-

vised her

third part

to trustees

for such uses

as

*Mary Bark-**er*, notwith-

standing her

coverture

should ap-

point.

Remainder

in trust for

*Edward**Barker* herson, the father of the defendant in tail general. Death of *Judith Killigrew*.

“ advowson, and the said *Edward Barker* the grandfather, and
 “ *Mary* his wife, in right of the said *Mary*, became and were
 “ seised of and in one other third part of the said advowson, and
 “ the said *Judith Killigrew* became and was seised of, and in
 “ the other third part of the said advowson; and the said *John*
 “ *Romney* so being incumbent as aforesaid, the said vicarage after-
 “ wards to wit, on the 8th day of *June* in the year of our Lord
 “ 1730, became vacant by the resignation of the said *John Romney*,
 “ which said avoidance was the first and next avoidance of the said
 “ vicarage after the death of the said *Lucy Killigrew* the mother;
 “ and because the said *James Cook, Edward Barker* the grandfather,
 “ and *Mary* his wife, and *Judith*, did not then and there agree
 “ among themselves, to present jointly a fit person to the said vicar-
 “ age, it then and there belonged to the said *James Cook* to present
 “ a fit person to the said vicarage, but his said late majesty king
 “ *George the 2d.* usurping upon the said *James Cook*, presented the
 “ said *John Romney* to the said vicarage so being vacant, in the turn
 “ of the said *James Cook*, who on that presentation was admitted,
 “ instituted, and inducted into the same, in the time of his said
 “ late majesty king *George the 2d.* and became incumbent thereof:
 “ and the said *John Romney* so being such incumbent, and the said
 “ *Judith* being so seised of her said third part of and in the said
 “ advowson as aforesaid, the said *Judith* afterwards, to wit, on the
 “ 10th day of *May*, in the year of our Lord 1731, at the parish
 “ aforesaid, in the said county of *Hertford*, made her last will and
 “ testament in writing, executed and attested so as to pass her real
 “ estate, and thereby devised her said one-third part of and in the
 “ said advowson, (among other things) unto Sir *Philip Butler*
 “ *Bart.* and *Thomas Bruce Esq.* and their heirs, upon trust that
 “ they should dispose of the rents and profits thereof, during the
 “ life of the said *Mary Barker*, to such persons and uses as she
 “ should notwithstanding her coverture appoint, exclusive of her
 “ then, or any after taken husband, and after her decease, in trust
 “ for *Edward Barker* the father of the said *Edward Barker*, the
 “ now defendant, and son of the said *Edward Barker*, the grand-
 “ father, and *Mary* his wife, and the heirs of his body lawfully
 “ to be begotten, with divers remainders over in default of issue
 “ of the said *Edward Barker* the father in the said will mentioned,
 “ and afterwards, to wit, on the 18th day of *June*, in the year of
 “ our Lord 1731, at the parish aforesaid, in the said county of
 “ *Hertford*, the said *Judith* died so seised of and in her said

“ third

" third part of the said advowson, without revoking or altering
 " her said will; upon whose death, the said Sir *Philip Butler* and
 " *Thomas Bruce*, by virtue of the said devise, became seised of the
 " said *Judith's* third part of the said advowson, during the life of
 " the said *Mary Barker*, on the trusts aforesaid, the said immediate
 " remainder thereof, and the several other remainders thereof re-
 " spectively belonging, as in the said will of the said *Judith* is for
 " that purpose limited and appointed: and the said Sir *Philip* and
 " *Thomas Bruce* being so seised thereof as aforesaid, the said *Mary*
 " afterwards, to wit, on the 1st day of *May*, in the year of our
 " Lord 1734, at the parish aforesaid, in the said county of *Hert-*
 " *ford*, died, leaving issue by her said husband, the said *Edward*
 " *Barker* the father, who was her only son, and on her death,
 " her said husband the said *Edward Barker* the grandfather, held
 " himself in of the third part of the said advowson, (the reversion
 " whereof originally descended to the said *Mary* from her said
 " father *Henry Killigrew*,) and became seised thereof for his life,
 " as tenant by the law of *England*, and the reversion thereof then
 " and there descended and came to the said *Edward Barker* the
 " father, as son and heir of the said *Mary*: and the said *Edward*
 " *Barker* the father, then and there also became by force of the
 " said will of the said *Judith*, seised of the one third part of the
 " said advowson, which was the said *Judith's*, in gross, by itself,
 " to him and the heirs of his body; and afterwards, to wit, on
 " the 1st day of *November*, in the year of our Lord 1747, the said
 " vicarage became vacant by the death of the said *John Romney*,
 " which said avoidance was the second avoidance of the said vi-
 " carage, after the death of the said *Lucy Killigrew* the mother;
 " and the said *Edward Barker* the grandfather, afterwards, and
 " during the vacancy of the said vicarage, to wit, on the 28th day
 " of *November*, in the year last aforesaid, at the parish aforesaid,
 " in the said county of *Hertford*, died so seised of the said third
 " part of the said advowson, (the reversion whereof expectant as
 " aforesaid, descended from the said *Henry Killigrew* to the said
 " *Mary* as aforesaid,) having first duly made his last will and
 " testament in writing, and appointed *Edward Radcliffe*, *Arthur*
 " *Radcliffe*, and *James Whitechurch* the younger executors there-
 " of; upon whose death the said *Edward Barker* the father became
 " seised of the same one third part of the said advowson, and be-
 " ing so seised thereof, and being so also seised in form aforesaid of
 " the said other third part of the said advowson, which was the
 " said *Judith's*, and the said vicarage being so vacant, it then
 " mother *Mary's* third part, and in tail of his aunt *Judith's*. Presentation belonged to the executors of
 " *Edward Barker* the grandfather.

1790.

THRALE
 v.
 The Bishop
 of LONDON.
 Trustees
 seised.

Death of
 Mary Bark-
 er.

Edward Barker the grandfather, her husband, tenant by the curtesy of her third part. Reversion thereof descended to *Edward Barker* the father, son of *Mary*. *Edward Barker* the father seised of *Judith Killigrew's* third part in tail general. Church vacant by the death of *Romney*. 2d avoidance after the death of *Lucy* the mother, during the vacancy *Edward Barker* the grandfather died, having made his will and appointed executors. *Edward Barker* the father, seised in fee of his

and

1790.

THRALE
v.The Bishop
of LONDON.Caleb Lomax
usurping on
them pre-
sented Bel-
lamy.Edward
Barker the
father suf-
fered a com-
mon reco-
very of the
two third
parts of Ma-
ry Barker
and Judith
Kilgus &c.

“ and there belonged to the said executors of the said *Edward Barker* the grandfather to present to the said vicarage, but one
 “ *Caleb Lomax* usurping on the said executors, presented the said
 “ *Daniel Bellamy*, in the said declaration of the said *William Thrale*, *John Cowper*, and *William Lawrence* mentioned, his
 “ clerk to the said vicarage so being vacant as aforesaid; who
 “ on that presentation was admitted, instituted, and inducted into
 “ the same, in the time of his said late majesty King *George the*
 “ 2d. and became incumbent thereof in manner and form as
 “ the said *William Thrale*, *John Cowper*, and *William Lawrence*
 “ have in their said declaration above alleged; and the said
 “ *Daniel* so being such incumbent, afterwards, to wit, on the
 “ 19th day of *April* in the year of our Lord 1751, at the parish
 “ aforesaid, in the said county of *Hertsford*, by a certain indenture
 “ then and there made between the said *Edward Barker* the father,
 “ of the one part; and one *Joseph Pickering*, gent. of the other
 “ part, (one part of which said last mentioned indenture, sealed
 “ with the seal of the said *Edward Barker* the father, the said
 “ *Edward Barker* the now defendant brings here into court,
 “ the date whereof is the day and year last aforesaid, the said
 “ *Edward Barker* the father, for the consideration of a certain
 “ sum of money therein mentioned to be paid to him by the
 “ said *Joseph Pickering*, did bargain and sell to the said *Joseph*
 “ *Pickering*, the two third parts of the said advowson, which
 “ were of the said *Mary* and *Judith*, to have and to hold the
 “ same, unto the said *Joseph Pickering*, from the day of the date of
 “ that indenture, for one year from thence next ensuing, as by the
 “ same indenture more fully appears; by virtue whereof the said
 “ *Joseph Pickering* became possessed of those two third parts of
 “ the said advowson for that term, and being so possessed thereof,
 “ and the reversion thereof belonging to the said *Edward Barker*
 “ the father, afterwards to wit, on the 20th day of the same month
 “ of *April*, in the year of our Lord 1751, at the parish aforesaid
 “ in the said county of *Hertsford*, by a certain indenture then and
 “ there made between the said *Edward Barker* the father, of the
 “ first part: the said *Joseph Pickering* of the second part; and
 “ one *Joseph Warner* of the third part; (one part of which said
 “ last mentioned indenture sealed with the seal of the said *Edward*
 “ *Barker* the father, the said *Edward Barker* the now defendant
 “ brings here into court, (the date whereof is the day and year
 “ last aforesaid) the said *Edward Barker* the father granted
 “ to the said *Joseph Pickering* and his heirs, the same two third
 “ parts

“ parts of the said advowson, To have and to hold the same
 “ unto the said *Joseph Pickering* and his heirs, as by the said last
 “ mentioned indenture more fully appears; by virtue of which said
 “ last mentioned indenture, the said *Joseph Pickering* became and
 “ was seised of those two third parts of the said advowson in gross,
 “ as of fee and right; and the said *Joseph Pickering* being so seised
 “ thereof, the said *Joseph Warner*, afterwards, to wit, in fifteen
 “ days of *Easter*, in *Easter* term in the 24th year of the reign of
 “ his said late majesty King *George* the 2d. in the court of his
 “ said late majesty of the bench, impleaded the said *Joseph Pick-*
 “ *ering*, in a plea of land, of those two third parts of the said ad-
 “ vovson, by a certain other writ of his said late majesty king
 “ *George* the 2d. of *entry sur disseisin en le post*, then returnable in
 “ the same court, and duly returned; and the said *Joseph Warner*
 “ then duly appearing in the said court, the said *Joseph Pickering*
 “ in the court of his said late majesty king *George* the 2d. of the
 “ bench at *Westminster*, at the return of the said writ, came and
 “ vouched thereof to warranty the said *Edward Barker* the
 “ father, who was then present in the same court, in his proper
 “ person, and freely then and there warranted to the said *Joseph*
 “ *Pickering*, the said two third parts of the said advowson, and
 “ vouched thereof to warranty *Edmund Wilson*, who was then and
 “ there likewise present in the same court, in his proper person,
 “ and freely warranted to the said *Edward Barker* the father, the
 “ said two-third parts of the said advowson, and thereupon in the
 “ same court before Sir *John Willes*, knight, and his companions,
 “ then justices of his said late majesty King *George* the 2d. of the
 “ bench aforesaid, in the same *Easter* term, such proceedings were
 “ had upon the said last mentioned writ, that it was considered
 “ by the same court, that the said *John Warner* should recover
 “ his seisin against the said *Joseph Pickering* of the same two third
 “ parts of the said advowson, and that the said *Joseph Pickering*
 “ should have of the land of the said *Edward Barker*, the father,
 “ to the value, &c. : and that the said *Edward Barker*, the father,
 “ should have of the land of the said *Edmund Wilson*, to the value,
 “ &c. and that the said *Edmund Wilson* should be in mercy, &c.
 “ Whereupon the said *Joseph Warner* prayed the writ of his said
 “ late majesty King *George* the 2d. to be directed to the then
 “ sheriff of the said county of *Hertford*, returnable immediately,
 “ to cause full seisin of the same two third parts of the said ad-
 “ vovson to be delivered to him; which writ was granted to him
 “ returnable in the same court; and the said sheriff afterwards

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To the use
of himself
in fee.

Conveyance
by Edward
Barker the
father, of the
said two
third parts

To trustees,

“ in the same term returned that he delivered seisin thereof to the
 “ said *Joseph Warner*, as by the said last mentioned writ he was
 “ commanded ; as by the record of the said judgment and pro-
 “ ceedings in the said court of our said lord the now king of the
 “ bench here remaining, it more fully appears : which said re-
 “ covery in form aforesaid had, was had to the use of the said
 “ *Edward Barker* the father, and his heirs ; by virtue of which
 “ said recovery, the said *Edward Barker*, the father, became and
 “ was seised of the same two third parts of the said advowson, in
 “ gross, by itself, as of fee and right : And being so seised there-
 “ of, the said *Edward Barker* the father, afterwards, to wit, on
 “ the 1st day of *October*, in the year of our Lord 1751, at the
 “ parish aforesaid, in the said county of *Hertford*, by a certain other
 “ indenture then and there made between the said *Edward Barker*,
 “ the father, of the one part, and *Windmills Crompton Esq.* and *James*
 “ *Whitechurch Esq. &c.* of the other part, (one part of which
 “ said last mentioned indenture, sealed with the seal of the said
 “ *Edward Barker*, the father, the said *Edward Barker*, the now
 “ defendant brings here into court, the date whereof is the day and
 “ year last aforesaid) for and in consideration of a certain sum of
 “ money therein mentioed to be paid to him by the said *Wind-*
 “ *mills*, and *James Whitechurch*, bargained and sold the same two
 “ third parts of the said advowson to the said *Windmills* and *James*
 “ *Whitechurch*, to have and to hold the same unto the said *Windmills*,
 “ and the said *James Whitechurch*, from the day next before the
 “ day of the date of the said last mentioned indenture, for one year
 “ from thence next ensuing, as by the said indenture more fully
 “ appears ; by virtue whereof the said *Windmills* and *James*
 “ *Whitechurch* became possessed of those two third parts of the said
 “ advowson for that term ; and being so possessed thereof, and the
 “ further reversion thereof belonging to the said *Edward Barker*
 “ the father, the said *Edward Barker* the father, afterwards, to
 “ wit, on the 2d day of *October*, in the said year of our Lord 1751,
 “ at the parish aforesaid in the said county of *Hertford*, by a cer-
 “ tain other indenture then and there made between the said
 “ *Edward Barker* the father, and *Anne* his wife, of the first part,
 “ the said *James Cook* of the second part ; and the said *Windmills*
 “ and *James Whitechurch* of the third part ; (one part of which
 “ said last mentioned indenture sealed with the seal of the said
 “ *Edward Barker* the father of the said *Edward Barker* the now
 “ defendant brings here into court, the date whereof is the day and
 “ year last aforesaid) for the consideration therein mentioned,
 “ granted

“ granted to the said *Windmills* and *James Whitechurch*, the same
 “ two third parts of the said advowson, to have and to hold the
 “ same unto the said *Windmills* and *James Whitechurch*, and their
 “ heirs, to the use of the said *Edward Barker* the father, for the
 “ term of his life, and from and after the determination of that
 “ estate, to the use of the said *Windmills* and *James Whitechurch*
 “ and their heirs during the life of the said *Edward Barker* the
 “ father, to support the contingent remainders therein after limited,
 “ and to preserve the same from being defeated and destroyed, and
 “ from and after the death of the said *Edward Barker* the father,
 “ to the use of the said *Anne Barker*, for her life, and from and
 “ after the death of the said *Anne Barker*, to the use of all and
 “ every the children of the said *Edward Barker* the father, and
 “ the said *Anne*, or any one or more of such children, in such
 “ parts, shares, and proportions, and for such estate and estates,
 “ and subject to such provisoes, conditions, and limitations, and
 “ in such manner and form as the said *Edward Barker* the fa-
 “ ther, by any writing or writings under his hand and seal duly
 “ executed in the presence of two witnesses, or by his last will
 “ and testament in writing duly executed and attested, should di-
 “ rect and appoint, and for default of such direction and appoint-
 “ ment, to certain uses in the said last mentioned indenture men-
 “ tioned, as by the same indenture more fully appears: By virtue
 “ of which said last mentioned indenture, the said *Edward Barker*
 “ the father, became seised of the same two third parts of the said
 “ advowson in gross by itself as of freehold and right for his life,
 “ the several remainders and reversions thereof respectively be-
 “ longing as in the said last mentioned indenture is for that pur-
 “ pose limited and declared; and the said *Edward Barker* the fa-
 “ ther being so seised thereof, and the several remainders and
 “ reversion thereof respectively belonging as aforesaid, the said
 “ *Edward Barker* the father afterwards to wit, on the 20th day
 “ of *June* in the year of our Lord 1759 at the parish aforesaid, in
 “ the county of *Hertford*, by a certain indenture then and there
 “ made between the said *Edward Barker* the father, under the
 “ hand and seal of the said *Edward Barker* the father, and duly
 “ executed by the said *Edward Barker* the father in the presence
 “ of two witnesses of the one part, and one *Henry Barker* Esq.
 “ of the other part, (one part of which said last mentioned inden-
 “ ture sealed with the seal of the said *Edward Barker* the father,
 “ the said *Edward Barker* the now defendant brings here into
 “ court, the date whereof is the day and year last aforesaid) for

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 v.
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to the use of
 himself for
 life,
 remainder to
 trustees to
 preserve
 contingent
 remainders.

Remainder
 to the use of
Anne his
 wife for life.

Remainder
 to the use of
 their children
 in such man-
 ner as *Ed-
 ward Barker*
 the father
 should ap-
 point.

Appoint-
 ment by *Ed-
 ward Barker*
 the father, of
 the said two
 third parts,
 to the use of
*Edward
 Barker* his
 son, the de-
 fendant in
 sec.

1790. “ the considerations therein mentioned, did direct and appoint
 “ the same two third parts of the said advowson from and after
 “ the several deceases of the said *Edward Barker* the father and
 “ *Anne* his wife, unto the said *Edward Barker* the now defendant
 “ and his heirs, to hold the same from and immediately after the
 “ death of the said *Edward Barker* the father, and the said *Anne*
 “ and the survivor of them, unto the said *Edward Barker*, the
 “ now defendant and his heirs; as by the same indenture more
 “ fully appears: by virtue of which said last mentioned indenture,
 “ the said *Edward Barker* the now defendant became seised of
 “ the reversion of the same two third parts of the said advowson,
 “ in gross by itself, as of fee and right; and the said *Edward*
 “ *Barker* the now defendant being so seised thereof, the said *Ed-*
 “ *ward Barker* the father, afterwards to wit, on the first day of
 “ *January*, in the year of our Lord 1761, at the parish aforesaid,
 “ in the said county of *Hertford*, died so seised of the same two
 “ third parts of the said advowson, upon whose death the said
 “ *Anne Barker* became seised of the same two third parts of the
 “ said advowson, in gross by itself, as of freehold and right for
 “ her life; and the said *Anne Barker* being so seised thereof, and
 “ the said *Edward Barker* the now defendant being so seised of the
 “ reversion thereof as aforesaid, afterwards to wit on the 27th
 “ day of *January*, in the year of our Lord 1779, by a certain
 “ indenture then and there made between the said *Anne* of the
 “ one part, and the Rev. *John Lockman*, D. D. of the other part,
 “ (one part of which said last mentioned indenture, sealed with
 “ the seal of the said *Anne Barker*, the said *Edward Barker* the
 “ now defendant brings here into court, the date whereof is the
 “ day and year last aforesaid,) the said *Anne Barker* for a certain
 “ sum of money therein mentioned to be paid to her by the said
 “ *John Lockman*, did grant, bargain, and sell the same two third
 “ parts of the said advowson, unto the said *John Lockman*, to have
 “ and to hold the same unto the said *John Lockman*, from the day
 “ next before the day of the date of that indenture, for one year
 “ from thence next ensuing, as by the same indenture more fully
 “ appears; by virtue whereof the said *John Lockman* became
 “ possessed of the said two third parts of the said advowson for
 “ that term, and the said *John Lockman* being so possessed there-
 “ of, the said *Anne* afterwards to wit, on the 28th day of *January*,
 “ in the year of our Lord 1779, at the parish aforesaid in the
 “ county of *Hertford*, by a certain other indenture then and there
 “ made between the said *Anne* of the first part, the said *Edward*
 “ *Barker*,

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 The Bishop
 of LONDON.

By virtue of
 which *Ed-*
ward Barker
 the defend-
 ant became
 seised of the
 reversion.

Death of
Edward
Barker the
 father.

Anne his
 wife seised
 for life.

Conveyance
 by her.

“ *Barker* the now defendant of the second part, and the said *John*
 “ *Lockman* of the third part, (one part of which said last mentioned
 “ indenture sealed with the seal of the said *Anne Barker*, the said
 “ *Edward Barker* the now defendant brings here into court, the
 “ date whereof is the day and year last aforesaid,) for the consi-
 “ derations therein mentioned, granted the same two third parts
 “ of the said advowson to the said *John Lockman* and his heirs to
 “ have and to hold the same unto the said *John Lockman* and his
 “ heirs, in trust for the said *Edward Barker*, the now defendant
 “ and his heirs, as by that indenture more fully appears; by virtue
 “ whereof the said *Edward Barker* the now defendant, became
 “ and was seised of and in the said two third parts of the said ad-
 “ vovson, in gross by itself, as of fee and right: And the said
 “ *Edward Barker* the now defendant, being so seised thereof, the
 “ said vicarage became vacant by the death of the said *Daniel*
 “ *Bellamy*, as the said *William Thrale*, *John Cowper*, and *William*
 “ *Lawrence*, have in their said declaration above alleged, which
 “ said avoidance is the third avoidance of the said vicarage after
 “ the death of the said *Lucy Killigrew* the mother; whereupon it
 “ then and there belonged, and still belongs to the said *Edward*
 “ *Barker* the now defendant, to present a fit person to the said
 “ vicarage; and this the said *Edward Barker* the now defendant
 “ is ready to verify, wherefore he prays judgment if the said
 “ *William Thrale*, *John Cooper*, and *William Lawrence*, ought to
 “ have or maintain their said action against him, together with
 “ his damages, according to the form of the statutes in that case
 “ made and provided, and a writ to the bishop,” &c.

The second plea of *Edward Barker*, the defendant, was the
 same as the first, till it came to the devise of *Henry Killigrew*,
 which was thus stated; “ and thereby devised the said advowson
 “ to *Lucy Killigrew*, his then wife for her life, and from and after
 “ her decease, he devised the same to the heir male of him the
 “ said *Henry Killigrew*, upon the body of the said *Lucy Killigrew*,
 “ begotten or to be begotten, and to his heirs and assigns, and for
 “ want of such issue, to all and every the daughter and daughters
 “ of the said *Henry Killigrew* upon the body of the said *Lucy* be-
 “ gotten or to be begotten, and to her or their heir or heirs and
 “ assigns for ever, as tenants in common, if more than one, and
 “ not as joint-tenants; and afterwards to wit on the 20th day of
 “ *December*, in the year of our Lord 1712, at the parish aforesaid
 “ in the said county of *Hertford*, died so seised of and in the said
 “ advowson, without leaving issue male of his body, and leaving
 “ the said *Lucy Killigrew*, and three daughters of him the said

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 v.
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 of LONDON.

and *Edward*
Barker the
 defendant;
 to a trustee,
 to the use of
Edward
Barker the
 defendant in
 fee.

Death of
Bellamy.

Third a-
 voidance af-
 ter the death
 of *Lucy Kil-*
ligrew the
 mother.

Devise by
Henry Killi-
grew to his
 daughters as
 tenants in
 common.

Death of
Henry Killi-
grew.

1700.

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v.
The Bishop
of LONDON.

Three
daughters,
Lucy, Mary,
and *Judith.*
Lucy Killigrew
the
mother seised
for life.

By a settle-
ment made
on the mar-
riage of
James Cook
with *Lucy*
the daugh-
ter.

Reversion of
the third
part of the
advowson
belonging to
Lucy the
daughter
granted to
trustees, to
the use of
Lucy the
mother for
life, remain-
der to *James*
Cook for life,
remainder to
Lucy the
daughter for
life,
remainder to
trustees to
preserve, &c.

“ *Henry Killigrew*, begotten on the body of the same *Lucy*, to
“ wit, *Lucy Killigrew*, *Mary*, and *Judith* him surviving, upon
“ whose death the said *Lucy Killigrew* the mother, by virtue of
“ the said last mentioned devise, became and was seised of the said
“ advowson, in gross by itself, as of freehold and right, for the
“ term of her life, the remainder thereof belonging to the said
“ *Lucy Killigrew* the daughter, *Mary* and *Judith*; and the said
“ *Lucy Killigrew* the mother, being so seised of the said advowson,
“ for the term of her life as aforesaid, and the remainder thereof
“ belonging to the said *Lucy*, *Mary*, and *Judith* the daughters
“ and their heirs in form aforesaid, and the said *John Fothergill* so
“ being incumbent of the said vicarage, afterwards to wit, on the
“ 28th day of *August* in the year of our Lord 1716, at the parish
“ aforesaid, in the said county of *Hertford*, by a certain indenture
“ of five parts, then and there made between one *James Cook*
“ Esq. of the first part, the said *Lucy Killigrew* the mother of the
“ second part, the said *Lucy Killigrew* the daughter of the third
“ part, *Martin Killigrew* Esq. and *Samuel Diggle*, gent. of the
“ fourth part, and *William Grimston* Esq. and *James Jennings* Esq.
“ of the fifth part, (one part of which said last mentioned inden-
“ ture, sealed with the several seals of the said *Lucy* the mother,
“ and *Lucy* the daughter, the said *Edward Barker* the now de-
“ fendant brings here into court, the date whereof is the day and
“ year last aforesaid,) they the said *Lucy Killigrew* the mother, and
“ *Lucy Killigrew* the daughter, for and in consideration of a mar-
“ riage intended then shortly to be had and solemnized between
“ the said *James Cook* and the said *Lucy Killigrew* the daughter,
“ and for and in consideration of a certain sum of money by the
“ said *William Grimston*, and *James Jennings*, to the said *Lucy*
“ *Killigrew* the mother and *Lucy Killigrew* the daughter, in hand
“ paid, did, and each of them did grant the one third part of the
“ said advowson, (the remainder whereof expectant on the said
“ life estate of the said *Lucy Killigrew* the mother, belonged to
“ the said *Lucy Killigrew* the daughter as aforesaid,) unto the
“ said *William Grimston*, and *James Jennings*, and their heirs, to
“ hold the same unto the said *William Grimston*, and *James Jen-*
“ *nings*, and their heirs, to the several uses hereafter mentioned,
“ (that is to say) to the use of the said *Lucy Killigrew* the mother
“ for life, and from and after her decease to the use of the said
“ *James Cook* for life without impeachment of waste, and from
“ and after the decease of the said *James Cook*, to the use of the
“ said *Lucy Killigrew* the daughter for her life, and immediately
“ from

“ from and after the determination of the said estates to the use
 “ of the said *William Grimston* and *James Jennings*, and their heirs,
 “ for and during the lives of the said *James Cook* and *Lucy Killigrew*
 “ the daughter, and the longer liver of them, to support the
 “ contingent remainders therein after limited, and to preserve the
 “ same from being defeated and destroyed; and from and after the
 “ decease of the survivor of them, the said *James Cook* and *Lucy Killigrew*
 “ the daughter, to the use and behoof of the sons and daughters of the said *James Cook*, on the body of the said *Lucy Killigrew*
 “ the daughter lawfully to be begotten, in such succession, and for such estates, as in the said indenture is for that
 “ purpose limited; and for default of such issue to the use and behoof of the said *James Cook* and his heirs, as by the said last
 “ mentioned indenture more fully appears: And the said *Edward Barker*
 “ the now defendant further saith, that the said intended marriage between the said *James Cook*, and the said *Lucy* the
 “ daughter, afterwards to wit, on the 29th day of *August*, in the
 “ year of our Lord 1716, at the parish aforesaid, in the said
 “ county of *Hertford*, took effect, and that by virtue of the said
 “ indenture, the said *Lucy Killigrew* the mother, became seised
 “ in gross by itself, as of freehold and right, for the term of her
 “ life, of and in the same one third part of the said advowson, the
 “ several remainders and reversion thereof respective belonging
 “ as in the said last mentioned indenture is for that purpose limited
 “ and declared; and being so thereof seised, and the several remainders
 “ and reversion thereof respectively belonging as aforesaid, and the said *Lucy Killigrew*
 “ the mother, being also so seised of the said other two third parts of the said
 “ advowson as aforesaid, and the said *Mary* and *Judith* being so respectively
 “ seised of and in their said respective remainders of their said
 “ respective third parts of the said advowson, as aforesaid, the said
 “ *Mary*, afterwards to wit, on the 3d day of *February*, in the
 “ year of our Lord 1726, at the parish aforesaid, in the said
 “ county of *Hertford*, took to husband the said *Edward Barker*
 “ the grandfather, whereby the said *Edward Barker* the grandfather, and *Mary*
 “ his wife, in right of the said *Mary*, became and were seised in gross by
 “ itself, as of fee and right, of and in the said remainder of the said *Mary*,
 “ of and in the said one third part, which was the said *Mary's*; and being so seised
 “ thereof, and the said *Lucy* the mother, being so seised of the whole of the
 “ said advowson as aforesaid, the said vicarage afterwards and in the life-time
 “ of the said *Lucy* the mother, to wit, on the first day of *October*, in the
 “ year of our Lord 1728, at the

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 v.
 The Bishop
 of LONDON,

remainder to
 children,
 &c.

Marriage
 took effect.

Marriage be-
 tween *Mary*
 the daughter
 and *Edward Barker*
 the
 grandfather.

- '1790. " parish aforesaid; became vacant by the death of the said *John*
 " *Fothergill*; whereupon it then and there belonged to the said
 THEALE " *Lucy Killigrew* the mother to present to the said vicarage so
 q. " being vacant; but one *Caleb Lomax*, usurping on the title of the
 The Bishop " said *Lucy Killigrew* the mother to the said advowson, presented
 of LONDON. " one *John Romney* his clerk, to the said vicarage so being vacant,
 Death of " who on that presentation, was admitted, instituted, and inducted
Fothergill. " into the same, in the time of his said late majesty King *George*
 Usurpation " the Second, and became incumbent thereof: and the said *John*
 of *Caleb Lomax* on *Lucy* " *Romney* so being such incumbent, and the said *Lucy Killigrew*
 the mother, " the mother, so being seised of the said advowson as aforesaid,
 by present- " the said *Lucy* the mother, afterwards to wit, on the 10th day
 ing *Romney.* " of *September*, in the year of our Lord 1729, at the parish aforesaid, died so seised of the said advowson, upon whose death the
 Death of " said *James Cook* became seised in gross by itself, as of freehold
Lucy the " and right for his life, of one third part of the said advowson,
Heir. " and the said *Edward Barker* the grandfather, and *Mary* his wife,
 " in right of the said *Mary*, became and were seised in gross by
 " itself, as of fee and right, of one other third part of the said ad-
 " vowson, and the said *Judith Killigrew* became seised in gross by
 " itself, as of fee and right, of the other one third part of the said
 " advowson; and being so respectively seised, and the said *John*
 " *Romney* so being incumbent as aforesaid, the said vicarage after-
 " wards to wit, on the 28th day of *June* in the year of our Lord
 " 1730, became vacant by the resignation of the said *John Romney*
 Resignation " whereupon it then and there belonged to the said *James Cook*,
 of *Romney.* " *Edward Barker* the grandfather and *Mary* his wife in right of
 " the said *Mary* and *Judith*, to present a fit person to the said vi-
 carage being so vacant, but his said late majesty King *George* the
 Usurpation " Second usurping upon the title of the said *James Cook*, *Edward*
 of *George 2.* " *Barker* the grandfather and *Mary* his wife, and *Judith Killigrew*,
 by present- " presented the said *John Romney* to the said vicarage so being
 ing *Romney.* " vacant, who on that presentation, was admitted, instituted, and
 " inducted into the same in the time of his said late majesty King
 " *George* the Second, and became incumbent thereof, &c."
- The remaining part of this plea was nearly the same as the first, the only variation arising from the daughters of *Henry Killigrew* being stated to be tenants in common.
- The third plea was also similar to the first; it stated a descent of the advowson to the daughters of *Henry Killigrew* in coparcenary, and also that on the resignation of *Romney*, *James Cook*, *Edward Barker* the grandfather, and *Judith Killigrew*, did not agree to present, &c. but it concluded with a traverse, "with-
 " out

“ out this that the said *Caleb Lomax* the father, in the said declaration of the said *William Thrale*, *John Cowper*, and *William Lawrence*, mentioned deceased, was in his life-time seised of the said advowson of the said vicarage in manner and form as the said *William Thrale*, *John Cowper*, and *William Lawrence*, have in their said declaration above alleged, and this the said *Edward Barker* is ready to verify,” &c.

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The fourth plea was also the same as the first, as far as the resignation of *Romney*, but went on as follows: “ which said resignation was fraudulently made by the said *John Romney*, without any notice given by the said *John Romney* thereof to the said *James Cook* and *Lucy* his wife, *Edward Barker* the grandfather and *Mary* his wife, and *Judith Killigrew*, or to any of them in that behalf; and thereupon his said late majesty King *George* the second, usurping upon the said *James Cook* and *Lucy* his wife, *Edward Barker* the grandfather and *Mary* his wife, and *Judith*, before they or any of them had notice of the said vacancy, presented the said *John Romney* to the said vicarage so being vacant, who on that presentation, and before the said *James Cook* and *Lucy* his wife, *Edward Barker* the grandfather and *Mary* his wife, and *Judith*, or any of them had notice of the same vacancy, was admitted, instituted, and inducted into the same, in the time of his said late majesty King *George* the second, and became incumbent thereof,” &c.

Fraudulent
resignation
of *Romney*
without notice
to the
co-parce-
ners.

It then went on like the first plea, to the death of *Edward Barker* the grandfather, during the vacancy occasioned by the death of *Romney*, his appointing executors of his will, and *Edward Barker* the father being seised of the two third parts of *Mary* his mother, and *Judith Killigrew*; after which it stated; “ because the said *James Cook*, *Edward Barker* the grandfather, and *Edward Barker* the father did not in the life-time of the said *Edward Barker* the grandfather, and the said *James Cook*, *Edward Radcliffe*, *Arthur Radcliffe*, and *James Whitechurch*, and *Edward Barker* the father did not after the death of the said *Edward Barker* the grandfather, after the said vacancy, agree among themselves to present jointly a fit person to the said vicarage, it then and there belonged to the said *James Cook* to present a fit person to the said vicarage, but one *Caleb Lomax* usurping on the said *James Cook*, presented the said *Daniel Bellamy*,” &c.

The remaining part of this plea was the same as the first.

Replication and judgment in the usual form against the bishop and the clerk.

Replication

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THRALE

The Bishop
of London.After the
death of
Henry Killigrew, *Lucy Killigrew*
the mother
granted the
first present-
ation to *Caleb Lomax* the
grandfather
of *Caleb Lomax* in the
declaration
mentioned.Death of
Fothergill.*Caleb Lomax*
the grand-
father pre-
sented *Romney*.Death of
Lucy the
mother.Replication to the first plea of the defendant *Edward Barker* :

“ That after the death of the said *Henry Killigrew*, the said
 “ *Lucy Killigrew* the mother being so seised of the said advowson,
 “ in gross by itself, as of freehold and right for her life, by virtue
 “ of the said devise of the said *Henry Killigrew*, and the reversion
 “ thereof belonging to the said *Lucy, Mary, and Judith*, the daugh-
 “ ters, as in that plea is mentioned, she the said *Lucy Killigrew*
 “ the mother, on the first day of *January*, in the year of our
 “ Lord 1715, at the parish aforesaid, in the county aforesaid, by
 “ her certain writing then and there made and sealed with her
 “ seal, for the considerations therein mentioned, gave, granted,
 “ and conveyed to the said *Caleb Lomax*, the grandfather of the
 “ said *Caleb Lomax* the son, in the said declaration mentioned, the
 “ first and next advowson, donation, nomination, presentation,
 “ and free disposition of the said vicarage of the church of *Saint*
 “ *Stephens* near *Saint Alban's* aforesaid, whensoever and howso-
 “ ever the same should first and next thereafter happen to become
 “ vacant; by virtue whereof the said *Caleb Lomax* the grandfather,
 “ was possessed of the advowson of the said vicarage, for the first
 “ and next avoidance thereof; and the said *Caleb Lomax* the grand-
 “ father being so possessed thereof, afterwards and during the life-
 “ time of the said *Lucy Killigrew* the mother, to wit, on the first
 “ day of *October*, in the year of our Lord 1728, the said vicarage
 “ became vacant by the death of the said *John Fothergill*, which
 “ said avoidance was the first and next avoidance of the said vicar-
 “ age after the said grant, whereupon it then and there belonged to
 “ the said *Caleb Lomax* the grandfather, to present a fit person to
 “ the said vicarage so being vacant, upon such first avoidance, who
 “ thereupon presented the said *John Romney* his clerk to the said
 “ vicarage so being vacant, who on that presentation was admitted,
 “ instituted and inducted into the same, in the time of peace, in
 “ the time of his late majesty *George* the second, late king of
 “ *Great Britain*, and became incumbent thereof; and the said
 “ *John Romney* so being such incumbent, and the said reversion of
 “ and in the said advowson belonging to *James Cook*, (who had in-
 “ termarried with the said *Lucy* the daughter,) and *Lucy* the
 “ daughter, in right of the said *Lucy* the daughter, *Edward Barker*
 “ the grandfather, (who had intermarried with the said *Mary*,
 “ and the said *Mary* in right of the said *Mary*, and *Judith Killi-*
 “ *grew*, afterwards, to wit, on the 10th day of *September*, in the
 “ year of our Lord 1729, at the parish aforesaid, in the county
 “ aforesaid, she the said *Lucy Killigrew* the mother died so seised of
 “ the said advowson for the term of her life as aforesaid; upon
 “ whose

“ whose death the said *James Cook* and *Lucy* his wife, in right
 “ of the said *Lucy*, the said *Edward Barker* the grandfather and
 “ *Mary* his wife in right of the said *Mary*, and the said *Judith*
 “ *Killigrew* then and there became and were seised of the said ad-
 “ vovson, in gross by itself, as of fee and right in co-parcenary;
 “ and the said *John Romney* so being incumbent as aforesaid, the
 “ said vicarage, afterwards, to wit, on the 8th day of *June*, in the
 “ year of our Lord 1730, became vacant by the resignation of the
 “ said *John Romney*, which said resignation was fraudulently made
 “ by the said *John Romney*, without any notice given by the said
 “ *John Romney* thereof to the said *James Cook* and *Lucy* his wife;
 “ *Edward Barker* the grandfather and *Mary* his wife, and *Judith*
 “ *Killigrew*, or any, or either of them, in that behalf; and there-
 “ upon his said late majesty usurping upon the said *James Cook*
 “ and *Lucy* his wife, *Edward Barker* the grandfather and *Mary*
 “ his wife, and *Judith*, and before they or either of them had
 “ notice of the same vacancy of the said vicarage, presented the
 “ said *John Romney*, to the said vicarage so being vacant, who on
 “ that presentation was admitted, instituted, and inducted into the
 “ same, in the time of his said late majesty king *George* the second,
 “ and became incumbent thereof: by reason of which said fraud-
 “ ulent resignation so made by the said *John Romney* as aforesaid,
 “ and the said usurpation of his said late majesty, the said *James*
 “ *Cook* and *Lucy* his wife, *Edward Barker* the grandfather and
 “ *Mary* his wife, and *Judith*, were prevented from agreeing among
 “ themselves, to present a fit person to the said vicarage upon that
 “ vacancy, as they would otherwise have done; and the said *John*
 “ *Romney* so being such incumbent, afterwards, to wit, in *Michael-*
 “ *mas* term, in the 5th year of the reign of his late majesty king
 “ *George* the second, late king of *Great Britain*, &c. in the court
 “ of his said late majesty, before *Robert Eyre*, *Robert Price*, *Alex-*
 “ *ander Denton*, and *John Fortescue*, all and then his said majesty's
 “ justices, and other faithful subjects of his said late majesty then
 “ present, a certain fine was levied between the said *Caleb Lomax*
 “ the grandfather, plaintiff, and the said *James Cook* and *Lucy* his
 “ wife, *Edward Barker* the grandfather and *Mary* his wife, and
 “ *Judith Killigrew*, deforceants of the said advovson, whereof a
 “ plea of covenant had been summoned between them in the same
 “ court, namely, that the said *James Cook* and *Lucy* his wife, *Ed-*
 “ *ward Barker* the grandfather and *Mary* his wife, and *Judith*
 “ *Killigrew*, acknowledged the said advovson to be the right of
 “ the said *Caleb Lomax* the grandfather, as the same which the
 “ said *Caleb Lomax* the grandfather had of the gift of the said
 “ *James*

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THRALE

The Bishop
of London.Fraudulent
resignation
of *Romney*
without no-
tice to the
co-parce-
ners.Usurpation
of *George* 2.
by present-
ing *Romney*,by which
fraudulent
resignation
of *Romney*,
the co-par-
ceners were
prevented
from agree-
ing to pre-
sent.Fine levied
by the co-
parceners.Sur cognu-
zance de
droit came
ces, &c.

1790.

THRALE
v.
The Bishop
of LONDON.

To the use of
Caleb Lomax
the grand-
father in fee.

His death.

Death of
R. mery.

Caleb Lomax
the father
presented
B. ilamy.

Traverse
that on the
resignation
of *Romney*
it belonged
to *James*
Cook to pre-
sent, &c.

“ *James Cook* and *Lucy* his wife, *Edward Barker* the grandfather
“ and *Mary* his wife, and *Judith Killigrew*, and they remitted
“ and quit claimed the same from the said *James Cook* and *Lucy*
“ his wife and their heirs, *Edward Barker* the grandfather and
“ *Mary* his wife and their heirs, and *Judith Killigrew* and her
“ heirs, to the said *Caleb Lomax* the grandfather and his heirs;
“ and the said *James Cook* and *Lucy* his wife, *Edward Barker* the
“ grandfather and *Mary* his wife, and *Judith Killigrew*, granted
“ for themselves and their heirs respectively, that they would
“ warrant to the said *Caleb Lomax* the grandfather and his heirs,
“ the said advowson against them the said *James Cook* and *Lucy*
“ his wife, *Edward Barker* the grandfather and *Mary* his wife, and
“ *Judith Killigrew* and their respective heirs for ever, as by the
“ said fine remaining of record in the court of our lord the now
“ king of the bench here more fully appears: Which said fine so
“ as aforesaid had and levied, was had and levied to the use of the
“ said *Caleb Lomax* the grandfather and his heirs for ever; where-
“ by the said *Caleb Lomax* the grandfather became, and was seised
“ of and in the said advowson in gross by itself, as of fee and
“ right: and the said *Caleb Lomax* the grandfather being so seised
“ of the said advowson of the said vicarage as aforesaid, afterwards
“ died seised of his said estate therein, upon whose death the
“ advowson of the vicarage descended to *Caleb Lomax* the father
“ of the said *Caleb Lomax* the son in the said declaration mention-
“ ed as the son and heir of the said *Caleb Lomax* the grandfather;
“ whereby the said *Caleb Lomax* the father was seised of the said
“ advowson, as in gross by itself, as of fee and right; and being
“ so seised thereof, afterwards and after the death of the said *Ca-*
“ *leb Lomax* the grandfather, to wit, on the first day of *November*,
“ in the year of our Lord 1747, the said vicarage became vacant
“ by the death of the said *John Romney*, whereby it then and
“ there belonged to the said *Caleb Lomax* the father to present a
“ fit person to the said vicarage, and the said *Caleb Lomax* the
“ father accordingly presented the said *Daniel Bellamy* his clerk
“ to the said vicarage so being vacant, who on that presentation
“ was admitted, instituted, and inducted into the same in the
“ time of peace, in the time of his said late majesty King *George* the
“ second, and became incumbent thereof, in manner and form
“ as the said *William Thrale*, *John Cowper*, and *William Lawrence*,
“ have in their said declaration above alleged; *Without this, that*
“ *upon the said avoidance so made by the resignation of the said John*
“ *Romney, it then and there belonged to the said James Cook to pre-*
“ *sent*

“ sent a fit person to the said vicarage, in manner and form as the
 “ said Edward hath in and by his said plea by him first above pleaded
 “ in bar in that behalf alleged,” &c.

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 v.
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 of LONDON.

The replication to the second plea was as follows ;—

“ And the said *William Thrale*, *John Cowper*, and *William Lawrence*, as to the said plea of the said *Edward* by him secondly
 “ above pleaded in bar, say that they by reason of any thing by the
 “ said *Edward* in that plea above alleged, ought not to be barred
 “ from having and maintaining their aforesaid action thereof
 “ against him, because they say, that after the death of the said
 “ *Henry Killigrew* without issue male, the reversion of the said
 “ advowson expectant upon the death of the said *Lucy Killigrew* the
 “ mother, descended upon the said *Lucy* the daughter, *Mary*, and
 “ *Judith*, as daughters and co-heiresses of the said *Henry Killigrew*
 “ in co-parcenary ; and the said *Lucy Killigrew* the mother being
 “ so seised of the said advowson in gross by itself as of freehold and
 “ right for her life, by virtue of the said devise of the said *Henry*
 “ *Killigrew*, and the reversion thereof belonging to the said *Lucy*,
 “ *Mary*, and *Judith* the daughters, in co-parcenary as above men-
 “ tioned, she the said *Lucy Killigrew* the mother, on the first day of
 “ *January* in the year of our Lord 1715, at the parish aforesaid,
 “ in the county aforesaid, by her certain writing then and there
 “ made and sealed with her seal, for the considerations therein
 “ mentioned, gave, granted, and conveyed the said *Caleb Lomax*
 “ the grandfather of the said *Caleb Lomax* the son in the said de-
 “ claration mentioned, the first and next advowson, donation, no-
 “ mination, presentation, and free disposition of the said vicarage
 “ of the church of *Saint Stephen's* near *Saint Alban's* aforesaid,
 “ whensoever and howsoever the same should first and next there-
 “ after happen to become vacant ; by virtue whereof the said *Caleb*
 “ *Lomax* the grandfather was possessed of the advowson of the said
 “ vicarage for the first and next avoidance thereof ; and the said
 “ *Caleb Lomax* the grandfather being so possessed thereof, afterwards
 “ and during the life-time of the said *Lucy Killigrew* the mother,
 “ to wit on the 1st day of *October* in the year of our Lord 1728,
 “ the said vicarage became vacant by the death of the said *John*
 “ *Fothergill* ; which said avoidance was the first and next avoidance
 “ of the said vicarage after the said grant ; whereupon it then and
 “ there belonged to the said *Caleb Lomax* the grandfather to pre-
 “ sent a fit person to the vicarage so being vacant ; who thereupon
 “ presented the said *John Romney* his clerk to the said vicarage so
 “ being vacant, who on that presentation was admitted, instituted,

After the
 death of
*Henry Killi-
 grew*,

Lucy the
 mother

granted the
 next present-
 ation to *Caleb*
Lomax the
 grandfather.

Church va-
 cant.

Caleb Lomax
 the grandfa-
 ther present-
 ed *Romney*.

1790. " and inducted into the same, in the time of peace, in the time of his
 " late majesty King *George* the 2d. late king of *Great Britain*, and
 " became incumbent thereof; and the said *John Romney* so being
 " such incumbent, afterwards to wit, on the 10th day of *September*
 " in the year of our Lord 1729, at the parish aforesaid, in the
 " county aforesaid, the the said *Lucy Killigrew* the mother died, so
 " seised of the said advowson for the term of her life as aforesaid,
 " upon whose death the said *James Cook* (to whom the said *Lucy*
 " the daughter had before her intermarriage with him granted her
 " third part of the said advowson expectant upon the death of the
 " said *Lucy Killigrew* the mother, for the term of his natural life,
 " with other remainders over,) *Edward Barker* the grandfather
 " who had intermarried with the said *Mary* the daughter, and the
 " said *Mary* in the right of the said *Mary*, and the said *Judith Kil-*
 " *ligrew* then and there became, and were seised of the said advow-
 " son in gross by itself, that is to say, the said *Edward Barker* the
 " grandfather, and *Mary* in right of the said *Mary*, and the said
 " *Judith* of their said respective third parts, as of fee and right,
 " and the said *James Cook* as of freehold and right of his third
 " part for the term of his natural life; and the said *John Romney*
 " so being incumbent as aforesaid, the said vicarage afterwards to
 " wit, on the 8th day of *June*, in the year of our Lord 1730,
 " became vacant by the resignation of the said *John Romney*,
 " which said resignation was fraudulently made by the said *John*
 " *Romney*, without any notice given by the said *John Romney*
 " thereof to the said *James Cook*, *Edward Barker* the grandfather,
 " and *Mary* his wife, and *Judith Killigrew*, or any or either of
 " them in that behalf; and thereupon his said late majesty usurp-
 " ing upon the said *James Cook*, *Edward Barker* the grandfather
 " and *Mary* his wife, and *Judith*, presented the said *John Romney*
 " to the said vicarage so being vacant, who on that presentation
 " was admitted, instituted, and inducted into the same, in the
 " time of his said late majesty King *George* the 2d. and became
 " incumbent thereof: And the said *John Romney* so being such
 " incumbent, afterwards to wit, in *Michaelmas* term in the 5th
 " year of the reign of his said late majesty *George* the 2d. late
 " king of *Great Britain*, &c. in the court of his said late majesty
 " before *Robert Eyre*, *Robert Price*, *Alexander Denton*, and *John*
 " *Fortescue Aland*, then his said late majesty's justices, and other
 " faithful subjects of his said late majesty's then present, a certain
 " fine was levied between the said *Caleb Lomax* the grandfather
 " plaintiff, and the said *James Cook*, *Edward Barker* the grand-
 " father,

THRALLE
 v.
 The Bishop
 of LONDON.

Death of
Lucy the
 mother.

Co-parce-
 ners seised of
 the advow-
 son.

Fraudulent
 resignation
 of *Romney*
 without no-
 tice.

George 2.
 usurping on
 the co-par-
 ceners pre-
 sented *Rom-*
ney.

Fine levied
 of the ad-
 vowson by
 all the co-
 parceners.

“ father, and *Mary* his wife, and *Judith Killigrew*, deforceants
 “ of the said advowson, whereof a plea of covenant had been
 “ summoned between them in the same court, namely, that the
 “ said *James Cook*, *Edward Barker* the grandfather, and *Mary* his
 “ wife, and *Judith Killigrew* acknowledged the said advowson
 “ to be the right of the said *Caleb Lomax* the grandfather, as the
 “ same which the said *Caleb Lomax* the grandfather had of the
 “ gift of the said *James Cook*, *Edward Barker* the grandfather,
 “ and *Mary* his wife, and *Judith Killigrew*; and they remitted,
 “ and quit claimed the same from the said *James Cook* and his
 “ heirs, *Edward Barker* the grandfather and *Mary* his wife, and
 “ their heirs, and *Judith Killigrew* and her heirs, to the said *Caleb*
 “ *Lomax* the grandfather and his heirs; and the said *James Cook*,
 “ *Edward Barker* the grandfather and *Mary* his wife, and *Judith*
 “ *Killigrew* granted for themselves and their heirs respectively,
 “ that they would warrant to the said *Caleb Lomax* the grand-
 “ father and his heirs the said advowson, against them the said
 “ *James Cook*, *Edward Barker* the grandfather, and *Mary* his
 “ wife, and *Judith Killigrew* and their respective heirs for ever,
 “ as by the said fine remaining of record in the court of our lord
 “ the now king of the bench here more fully appears; which said
 “ fine so as aforesaid had and levied, was had and levied to the
 “ use of the said *Caleb Lomax* the grandfather and his heirs for
 “ ever; whereby the said *Caleb Lomax* the grandfather became and
 “ was seised of and in the said advowson in gross by itself, as of
 “ fee and right: And the said *Caleb Lomax* the grandfather being
 “ so seised of the said advowson of the said vicarage as aforesaid,
 “ afterwards died seised of his said estate therein, upon whose death
 “ the said advowson of the vicarage descended to *Caleb Lomax* the
 “ father of the said *Caleb Lomax* the son in the said declaration
 “ mentioned, as the son and heir of the said *Caleb Lomax* the grand-
 “ father; whereby the said *Caleb Lomax* the father was seised of
 “ the said advowson of the said vicarage as in gross by itself as
 “ of fee and right; and being so seised thereof, afterwards and
 “ after the death of the said *Caleb Lomax* the grandfather, to wit
 “ on the 1st day of *November* in the year of our Lord 1747, the
 “ said vicarage became vacant by the death of the said *John Rom-*
 “ *ney*, whereby it then and there belonged to the said *Caleb Lomax*,
 “ the father, to present a fit person to the said vicarage, and the
 “ said *Caleb Lomax* the father accordingly presented the said *Da-*
 “ *niel Bellamy* his clerk, to the said vicarage so being vacant, who
 “ on that presentation was admitted, instituted, and inducted into
 “ the

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THRALE

v.
The Bishop
of LONDON.Sur conu-
xance de droit
come ces, &c.To the use
of *Caleb Lo-*
max the
grandfather
in fee.

His death.

Advowson
descended to
Caleb Lomax
the father.Church va-
cant by the
death of
Romney.
Caleb Lomax
the father
presented
Bellamy.

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v.
The Bishop
of London.

Traverse of
the devise of
Henry Killigrew to his
daughters as
tenants in
common.

“ the same in the time of peace, in the time of his said late majesty King *George* the 2d. and became incumbent thereof, in manner and form as the said *William Thrale*, *John Cowper*, and *William Lawrence*, have in their said declaration above alleged, without this, that the said *Henry Killigrew* devised the said advowson from and after the decease of *Lucy Killigrew* the mother, to the heir male of him the said *Henry Killigrew* upon the body of the said *Lucy Killigrew* begotten, or to be begotten, and to his heirs and assigns, and for want of such issue to all and every the daughter and daughters of the said *Henry Killigrew*, upon the body of the said *Lucy* begotten, or to be begotten, and to her or their heirs and assigns for ever, as tenants in common if more than one, and not as joint-tenants, in manner and form as the said *Edward* hath in and by his said plea by him secondly above pleaded in bar in that behalf alleged,” &c.

Replication to the third plea took issue on the traverse of *Caleb Lomax* the father being seized, &c.

General demurrer to the fourth plea, and joinder.

Rejoinder to the first replication, protesting against the sufficiency of the replication, denied that there was any record to the fine supposed to be levied by *James Cook*, *Edward Barker* the grandfather and *Mary* his wife, and *Judith Killigrew*, to the use of *Caleb Lomax* the grandfather, &c. and of this the said *Edward Barker* put himself upon the record, &c.

Rejoinder to the second replication, took issue on the traverse of the devise of *Henry Killigrew* to the heir male of his body, and for want of such issue, to his daughters, &c.

Rejoinder to the third replication, joined issue on the traverse. Joinder in demurrer to the fourth plea.

Surrejoinder, special demurrer to the rejoinder to the first replication, “ For that the said *William Thrale*, *John Cowper*, and *William Lawrence*, in and by their said replication, by them above pleaded to the plea of the said *Edward Barker* the now defendant, by him first above pleaded in bar, traversed a material and issuable point, and by that traverse tendered to the said *Edward Barker* a material issue, but the said *Edward Barker* the now defendant, hath not in and by his rejoinder, by him first above made, taken issue upon that traverse, or joined in issue with them thereupon, but hath passed by, and taken no notice thereof, and hath denied another part of the said replication of the said *William Thrale*, *John Cowper*, and *William Lawrence*, and hath attempted to put another point in issue, between the said *Edward*
“ *Barker*

“ *Barker* the now defendant, and the said *William Thrale, John 2730.*
 “ *Cowper*, and *William Lawrence*; and thereby hath attempted to
 “ introduce great uncertainty and confusion, and unnecessary
 “ length of pleading. And for that the said rejoinder concludes
 “ with the said *Edward Barker’s* (as to the matter therein con-
 “ tained) *putting himself upon the record*, which is inconsistent
 “ with the allegation contained in the said rejoinder, *that there is*
 “ *no such record* as is alleged in the replication, which the said
 “ rejoinder purports to be an answer to: whereby the said *Edward*
 “ *Barker* offers to prove the allegation contained in his said re-
 “ joinder, by a mode of trial, which if that allegation be true, is
 “ impossible: whereas the said *Edward Barker* ought to have
 “ concluded his said rejoinder *by offering to verify the negative*
 “ *allegation* therein contained, when and where the court should
 “ direct, in order to have given the said *William Thrale, John*
 “ *Cowper*, and *William Lawrence*, an opportunity to have an-
 “ swered thereto, and maintained the affirmative allegation con-
 “ tained in the said replication,” &c. Issue joined on the re-
 joinder to the second replication.

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Joinder in demurrer.

This case was argued in *Hilary* term last by *Le Blanc*, Serjt. for the plaintiffs, and *Lawrence*, Serjt. for the defendants, and again in the present term by *Adair*, Serjt. for the plaintiffs, and *Bond*, Serjt. for the defendants. The arguments on behalf of the plaintiffs were to the following effect:

In this case two points arise; one, on a general demurrer to the fourth plea; the other on a special demurrer to the first rejoinder. The former therefore is a matter of substance, the latter of form. The substantial objection to the fourth plea, (which is also applicable to the first,) is, that it does not sufficiently shew a disagreement of the co-parceners to present on the first avoidance of the vicarage, after the death of *Lucy Killigrew* the mother: it is only stated that they *did not* agree, whereas it ought to have been that they *could not*, since unless they *could not* agree no right devolved to the husband of the eldest sister. As the defendant deduces his title from the two younger co-parceners, it is incumbent on him to shew precisely in what manner the vicarage was presentable by turns, and make out his title against the eldest. If the right of the eldest co-parcener to present arose merely from the non-agreement, it might often happen that she would be injured by being ignorant of her right

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having

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having accrued, and an usurpation be incurred, by which her turn would be lost. This might happen either where there was no notice given of the vacancy, or where the vacancy was procured by a secret and fraudulent resignation. But the law is, that the right of presenting by turns arises from an *actual disagreement*, which is a constructive partition of the advowson. The fact that co-parceners *did* not present, is no more than evidence that they *could* not. All the authorities shew, that the right of the eldest co-parcener to present, arises when she and the others *cannot* agree. In *Co. Litt.* 166. *b.* it is laid down, "if there be divers co-parceners of an advowson, and they *cannot* agree to present, the law doth give the first presentment to the eldest." So also in *Co. Litt.* 186. *b.* it is said, "if two or more co-parceners be, and they *cannot* agree to present, the eldest shall present." So in 2 *Inst.* 356. "By the common law, if an advowson descended to divers co-parceners, if they *cannot* agree to present, the eldest sister shall have the first turn." To the same point are *Fitz. N. B.* 81. (a) *Dyer*, 55. *Year Book*, 30 *Ed.* 3. 15. *Roll. Abr.* 346. tit. *Present. al Eglise*, pl. 1. *Mallory Qua. Imp.* 74. 17 *Vin. Abr.* 407. note on pl. 6. *Ero. Abr. Present. al Eglise*, pl. 35 & 53. On the same principle the best precedents in pleading state that the co-parceners *could* not agree. *Co. Entr.* 468. (b) *Rast. Entr.* 515. *Herne's Pleader*, 601. 2 *Lutw.* 1123. And in a late case of *Pike v. Lindsey* (c), a right to present was stated to be in the eldest of four co-parceners, because they *could not* agree among themselves to present. It is also to be observed, that great doubts have been entertained, whether the privilege of the eldest co-parcener to present on a disagreement was alienable. *Co. Litt.* 166. *b.* note in the last edition. Thus much as to the substantial defects of the fourth plea.

With respect to causes of the special demurrer to the first rejoinder, the first point to be considered is, how the matter of title stands on these pleadings. Now though it be a general rule that the plaintiff must rest on the strength of his own title, and not on the weakness of that of his adversary, yet here the rule seems to be inverted; the defendant not having traversed the plaintiff's title, but passing that by, and setting up a title of his own, has put himself in the same situation in which the plaintiff would otherwise be in, *viz.* he has taken upon him-

(a) 4th Edit.

(b) *Ed.* 1670.(c) *Hill. 27 Cas. 3. C. B.*

self to make good his own title against all mankind (a). For the principal defect shewn by the demurrer is, that the defendant has passed by the traverse taken by the plaintiff, and himself traversed matter of inducement to the traverse of the plaintiff. There are two clear general rules of pleading by which these objections must be decided; one, that a traverse cannot be taken upon a traverse; the other, that matter of inducement is not traversable. The latter rule evidently appears from *Latch*, 111. *Sir William Jones*, 91. *Cro. Car.* 442.; the former from *Vaughan*, 62. *Hob.* 103. *Com. Dig.* tit. *Pleader* (G). Some exceptions indeed there are to these rules, but they are to be taken with reference to time and place. *Cro. Car.* 105. In all cases where the traverse in the bar takes away the time or place alleged in the declaration, the plaintiff may either join issue on that traverse, or himself traverse the matter of inducement. As in case for words spoken in the county of *A.* the defendant pleads a concord for words in every other county, and traverses the county of *A.*, the plaintiff may either join issue on the county, or traverse the concord. *Co. Litt.* 282. *b.* So in trespass on such a day, if the defendant pleads a licence on such a day, and traverses all days before or since, the plaintiff may traverse the licence. *Hob.* 104. But as it is also laid down by these authorities, that unless the first traverse be material, another traverse may be taken upon it, it must be considered whether the traverse in this case taken by the plaintiff, namely, "that on the resignation of *John Romney*, it belonged to *James Cook* to present," &c. be not a material traverse. That it is a good traverse appears from *The Grocers' Company v. The Archbishop of Canterbury*, 3 *Wils.* 214. *S. C.* 2 *Black.* 770. In that case the traverse was "without this, that it belonged to the said wardens and commonalty to present to the said church at the second turn, when the same became vacant by the death of the said *Timothy Puller*, in manner and form as the said *William Backhouse* hath above in that plea alleged," &c. The objection made to it on a special demurrer was, that it had not traversed matter of fact, but had attempted to put in issue matter of law to be tried by a jury. But the court on solemn argument determined it to be a good traverse, it being compounded

(a) With regard to the second cause of demurrer to the rejoinder, viz. that the defendant ought to have concluded with a verification instead of putting himself upon the record; it was admitted on both the arguments, that the objection could not be maintained, the law being now settled, that either conclusion was good. *Vide* 2 *Wils.* 213. & 2 *Term Rep. B. R.* 439. and the several authorities there cited.

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of matter of law and of fact, the law resulting from the fact. So in the present case, the traverse that on the resignation of *Romney* it belonged to *Cook* to present, was a mixed matter both of law and fact, where the law was an inference from the fact; yet it was objected that this traverse went to put matter of law in issue. It is also a material traverse, inasmuch as the title of the defendant depended on the right of *James Cook* to present. On the face of the pleadings the defendant is bound to prove his own title. The plaintiff having stated his title, the defendant instead of denying it sets out a paramount title of his own: if therefore the plaintiff can defeat the title of the defendant, his title as stated in his declaration, which the defendant has not denied, remains unimpeached upon the record. The traverse then is a material one, as it is a direct denial of a circumstance, without which the defendant's title could not be supported. His claim is derived from the right of the co-parceners to present by turns. But the right of co-parceners, as such, is to present all together. It is only on their disagreement that the right of presenting by turns arises. If then it did not belong to *Cook*, who had married the eldest sister, to present on the resignation of *Romney*, in the first turn, neither did it belong to the defendant in the second or third turn. By denying the right of *James Cook* to present, the right of the co-parceners to present in turns is also denied, on which the title of the defendant entirely depends. But even supposing it not to be a material traverse, this defect ought to have been pointed out by a special demurrer.

The substance of the arguments on the part of the defendant was as follows:

There are two points made on the side of the plaintiffs; one arising from the substance, the other from the form of the pleadings. With respect to the first, it is contended that from the words "*could not agree*" being used in many authorities and precedents, it is improper to say that the co-parceners "*did not agree*." But there is no authority to prove that an express disagreement must be stated. It may fairly be understood from the books using the words "*cannot*" or "*could not*," that they mean "*do not*" or "*did not*." From whatever cause the disagreement arises, the expression "*cannot* or *could not*" may be equally satisfied; whether it be, that all the parties do not know that there is a vacancy, or that some are infants, or out of the kingdom, or that the eldest presented without consulting the others. The words "*cannot*" or "*could not*" therefore do not necessarily imply

imply an actual disagreement. Besides, the plaintiff claims under all the co-parceners: his title therefore does not depend on the question, Whether one turn or the other was taken away by usurpation? But the law seems to be, that it belongs to the eldest to present if the co-parceners *do* not all agree, and that the right depends more properly on *non-agreement* than *disagreement*. In *Bro. Abr. tit. Present. al Eglise*, pl. 19. it is said by *Hill*, Justice, that "where an advowson descends to four co-parceners, the first presentation of mere right belongs to the eldest." In the *Doctor and Student*, b. 2. c. 30. p. 240. it is laid down, that "a presenting by turn holdeth always between co-parceners of an advowson, except they agree to present together, or that they agree by composition to present in some other manner." In *Watson's Clergyman's Law*, 45. (a) it is stated, that "if an advowson doth descend to four co-parceners, and the church after the death of their ancestor doth become void, if they *do not* all agree in a presentment, the clerk of the eldest shall be received," &c. And after citing authorities it goes on to say, "or if they *do* agree for one or more turns, to present jointly, and after *do not* so agree, the eldest sister shall present," &c. In like manner on the record of the former *quare impedit*, in which the right of the same advowson was disputed by the same family of *Lomax*, it was stated that the co-parceners "*never did agree*," which case was determined on solemn consideration, as appears from the note of Mr. Justice *Burnet* (b). As to the case cited from *Dyer*, 55. nothing appears to have been decided by it; if the guardian there mentioned were guardian in chivalry, the presentation in the names of both the co-parceners was right. With respect to the authority quoted from *Mallory*, which is a comment on the case in *Dyer*, the note there supposes the guardian to have been guardian in socage; but it is much more probable that he was guardian in chivalry.

With respect to the objections made by the plaintiffs on the form of the pleadings, that the defendant has passed by the traverse tendered and endeavoured to put in issue matter of inducement; those objections can only hold, if that traverse be material. But that it is immaterial will be clear from adverting to the case upon the record. The declaration states, that *Caleb Lomax* was seised in fee and presented *Bellamy*: the plea shews the presentation of *Bellamy* to have been by usurpation on the executors of *Edward Barker* the grand-father, and claims the present turn under the

(a) *Folio ed.* 1701.(b) *Vide post.*

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will of *Judith Killigrew*; the replication ought to support the declaration by shewing that the title of *Caleb Lomax* was a good one; this was all that was necessary; it accordingly sets forth a fine levied by the co-parceners to the use of *Caleb Lomax* in fee; here it ought to have stopped, that the defendant might have an opportunity to deny this material point; instead of which, it goes on to traverse that on the resignation of *Romney*, it belonged to *James Cook* to present: this vitiates the replication, inasmuch as it attacks the defendant's title without supporting that of the plaintiff set forth in the declaration, it being a certain rule that the plaintiff must recover by the strength of his own title, and not by the weakness of that of his adversary. The question is, Whether the plaintiffs have made out a good title? which cannot be unless they support their count. According to the rule in *Tuston v. Temple, Vaugh.* 8. the traverse taken by the plaintiff should have been of some fact inconsistent with the plaintiff's title, and which, if found against the defendant, would destroy his title. Now this traverse is not of a fact inconsistent with the title of the plaintiff, for his title is derived from all the co-parceners, and it is a matter of perfect indifference as to him, upon which of them the usurpation was. Nor does it destroy the defendant's title, for this is either the second or third turn since the usurpation, and in either the defendant is intitled. The traverse of the plaintiffs is also bad on another ground; it is taken of a conclusion in law; the words of the plea are, "because the co-parceners did not agree, &c. it then and there belonged to the said *James Cook* to present," &c. this is traversed in the replication, which being the traverse of a legal consequence is bad. *Doctr. Placit.* 351. 11 *Coke*, 10. b. *Yelv.* 199, 200. As to the conclusion of the rejoinder to the record, this is sufficiently warranted by *Poph.* 101. *Carth.* 517. 2 *Wils.* 113. The traverse then not being material to the plaintiff's title, the defendant might well pass it by and traverse that part of the replication which is material. *Digby v. Fitzherbert, Hob.* 106. If that which is the very essence of the plaintiff's case be pleaded only as an inducement to a traverse, and therefore not to be denied by the defendant, the plaintiff by a trick avoids having the merits of his own title tried, and yet denies that of the defendant. In *Tuston v. Temple, Vaugh.* 7. it is laid down that "the plaintiff who is to recover that which he hath not, must shew a good title before he can recover, or he shall never avoid the defendant's possession by shewing no title, or an insufficient, which

“ which is the same as none. It can be neither law nor common reason, for the plaintiff to tell the defendant, you have no title, and thence to conclude, therefore I have. The plaintiff must recover, if at all, by his own strength, and not by the defendant’s weakness, as is well urged and claimed in *Digby’s* and *Fitzherbert’s* case in the Lord *Hobart*.” And in the Bishop of *Worcester’s* case, *Vaugh.* 58. it is said, “ when you will recover any thing from me, it is not enough for you to destroy my title, but you must prove your own better than mine; for it is not rational to conclude, you have no right to this, and therefore I have; for without a better right *melior est conditio possidentis*.” As to the argument that matter of inducement is not traversable, though generally speaking this be true, yet where a material part of the plaintiff’s title is stated by way of inducement, there it may be traversed by the defendant, who could not otherwise have an opportunity to answer it. In *Poph.* 101. it is said, there may be a traverse upon a traverse where falsity is used to oust the plaintiff of the benefit which the law gives him. So also in *Fortescue*, 349. and *Str.* 117. it is holden, that when the first traverse is immaterial, *i. e.* when it does not put the proper point in issue, there may be a traverse upon a traverse: and the authority of *Str.* 117. is particularly applicable to the present case, as there the defendant was an actor, who was to recover on the strength of his own title, as the plaintiff is here. To the same effect also is *Co. Litt.* 282. b. *Cro. Eliz.* 99. *Carth.* 166. *Hob.* 106.

It was replied, that as to the authority of *Ero. Abr.* tit. *Present.* pl. 19. the *dictum* of *Hill*, Justice, is applied to a different case in the year book to which *1 roke* refers, 21 *Ed.* 3. c. 38. (a) With regard to the *Doctor and Student*, the title of the chapter containing the passage cited, must be attended to; and the title is, “ where there are divers patrons of an advowson, and the church voideth, and the patrons vary in their presentments, whether the bishop shall have liberty to present which of the incumbents that he will or not?” The court, therefore, in construing the passage adduced, will observe what the question in discussion was, to which the passage was applied, and which obviously related to a variation in presenting by joint patrons. As to *Watson’s Clergyman’s Law*, the authority cited only regards the duty of the ordinary where there is a variation in the presentment, and is

(a) The question in the Year Book is, Whether a grant by several co-parceners of their right in an advowson to the eldest, was good, not being stated to be by specialty? It is to this that the observation of *Hill*, Justice, refers.

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therefore inapplicable to the present question. As to the record of the former proceedings in *quare impedit* to recover the same advowson, in the first action *Crispin* the only person who pleaded claimed under the crown; and on the trial the title was found against him. Afterwards another action was brought, in which *Lomax* relied on the judgment by default against *Cook*, which was conclusive against him. There was no question concerning an usurpation on one or the other co-parcener, nor any averment that on account of a disagreement between the co-parceners it belonged to the eldest to present. As to the demurrer to the rejoinder, it is said that a traverse is taken in the replication on an inference of law, which is not traversable, and which, if the subject were traversable, is not a material traverse. It is therefore contended, that the other party may pass it by and traverse the matter of inducement. Now all the authorities cited with respect to the plaintiff's traverse, go only to shew, that the general rule is, that the plaintiff must not desert his own title, and fall upon the title of the defendant. But admitting that rule, it is not applicable in the present case. For though the plaintiff cannot desert his own title where the defendant *denies* it, yet it is clearly otherwise where the defendant confesses and avoids it: For there the plaintiff in his replication may traverse the matter of avoidance contained in the defendant's plea. This evidently appears from *Digby v. Fitzherbert*. The true point to be considered is, Whether the defendant rests on the matter of avoidance? if he does, the plaintiff may traverse it. The situation of the parties to this record is changed by the method of pleading; the plaintiff stands, as it were, in the place of the defendant, and is intitled to take advantage of the same rules of pleading, to which the defendant would have been intitled, if he had traversed the plaintiff's title, instead of confessing and avoiding it.

Cur vult advis.

On this day the judgment of the court was thus given by

Lord LOUGHBOROUGH.—The plaintiffs in this case are executors and devisees in trust, and intitle themselves to the advowson in question under the will of *Caleb Lomax*, whom the declaration states to have been seised in fee of the advowson, and to have presented on a former avoidance. To this declaration the defendant *Edward Barker* pleads four pleas. On the second and third issue is joined; the first and fourth are the subject of the

the argument before the court. The first plea states a title to 1790.
 the advowson in one *Ellis*, who presented in 1680; that *Ellis*
 conveyed it to *Killigrew*, that *Killigrew* devised it to his wife *Lucy*
 for her life, and that the reversion on the death of *Killigrew* de-
 scended to his three daughters in co-parcenary. It then states an
 avoidance during the life of *Lucy* the widow, and a presentation
 by *Lomax* the father of the testator, usurping on *Lucy*. It then
 states, that the living again became vacant after the death of
Lucy, by the resignation of the then incumbent *Romney*, and that
 the crown by usurpation on the right of the eldest co-parcener
 presented again the same clerk. It then states an avoidance by
 the death of that presentee, and another presentation on that
 avoidance by *Lomax* usurping upon the right of the second co-
 parcener. A title is then deduced at considerable length to the
 defendant from the second and third co-parcener, concluding with
 a claim to present on the existing vacancy, in the third turn.

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A replication is put in to this plea, and that replication states a
 purchase by *Lomax* of the right of *Lucy Killigrew* the widow, and
 a presentation of the advowson made by him during the life of
Lucy, on an avoidance then happening. A fine is then set forth,
 levied by the three co-parceners of the advowson, and a conveyance
 to *Lomax* under that fine. Having stated this title in behalf of
 the plaintiffs in answer to the plea, the replication concludes that
 the resignation of *Romney* was fraudulent and without notice, and
 traverses that upon that resignation it belonged to the eldest co-
 parcener to present. To this replication there is a rejoinder by
 the defendant, in which the defendant traverses the fine; and to
 that rejoinder there is a special demurrer, alleging as a defect,
 that there is a traverse taken upon a traverse.

In this part of the argument, it is incumbent on the plaintiffs
 to shew that their replication was good, and that the traverse with
 which it concludes was a material traverse. For if the replication
 be not good and the traverse material, the consequence will be,
 that the plea is a good bar to the title which the plaintiffs have
 set up in their declaration. It is a certain rule that the plaintiff
 must recover on the strength of his own title. That rule is not
 at all controverted; but it is argued on the part of the plaintiffs,
 that a defect in the defendant's title will leave the plaintiffs in
 possession of the title upon which they have declared, unanswered;
 and that the defendant when he pleads and sets forth a title in
 himself, puts himself in the situation of a plaintiff. This argument
 would

1790. would be well founded if the plea which the defendant has put in were bad on the face of it, since in that case the first error in pleading would be committed by the defendant, and the general title which the plaintiffs have shewn in their declaration would remain unanswered. But in the case before us it is not so; the plea is

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on the face of it a good plea; there is no objection to the manner in which the defendant has pleaded his title. The plaintiffs therefore must shew a more particular title than they have set forth in the declaration, and they find themselves under the necessity of abandoning the general title on which they declared, and of shewing by the replication a better title than that which the defendant has stated in his plea. Accordingly they do so; for admitting the right of *Killigrew* who is the ancestor under whom the defendant claims, the plaintiffs claim by virtue of a fine levied by all the co-parceners. This no doubt is a full and complete answer to the title set out in the plea. But then the plaintiffs, instead of resting on that title, instead of putting any matter in issue on that title, instead of drawing any conclusion on which there can be an issue, conclude with suggesting that the resignation of *Romney* was fraudulent, and that the usurpation for that turn was not an usurpation on the right of the eldest co-parcener; for that is distinctly the effect of the traverse. A great many cases were cited to shew that this traverse was material; and I admit that is the point to be proved. But it cannot be material in the abstract; it is material or not, *quoad* the right to support which it is taken. Now the right insisted on by the plaintiffs in their replication, is a right under the title of *Killigrew* to the advowson by a conveyance from the three co-parceners; and to that right so set out, whether the avoidance in question is in the first, second, or third turn, is of no sort of consequence. There is no question of turn, with respect to a person who claims in himself a title to the whole advowson; and the irrelevance of the traverse taken by the plaintiffs to the title set out, cannot appear more strongly than by comparing this case with the case 3 *Wils.* 214. which was cited in the argument to shew the sufficiency of the traverse on the part of the plaintiffs. In the case in *Wilson*, the title set up by the pleadings on each side was distinctly that of a presentation by turns. Neither the company of grocers nor the archbishop pretended either of them to have the general right to present to the living. But on the title deduced in the prior part of the pleadings, it was manifestly a presentation

presentation in which two turns belonged to the archbishop, and one to the grocers' company. The title of the plaintiffs therefore was directly maintained by the traverse which was taken in the replication: the archbishop had not only two turns, but the first turn was his confessedly *de jure*; the denying then that the plaintiffs had the right to the second turn, and the asserting that they had the right to the third turn, were in effect precisely the same propositions. By making good the point on which they took their traverse, they must by necessary consequence affirm and support the title set out in their declaration. But in the present case admitting what in all probability was true, that the right was not in the co-parceners, it would not tend to shew that the plaintiffs had derived a right from *Killigrew*, who by confession of the pleadings was clearly at one time intitled to the right which descended on the co-parceners, and which, unless it was passed by them, would still remain in them to be exercised according to the nature of their interest. It is said, however, that the defendant has rejoined informally, that he ought to have demurred to the replication. Now I take it, that wherever a traverse is immaterial, the other party may pass it by, and put in issue a more material part. But it is not necessary to consider, whether it were better for the defendant to have demurred to the replication, or to have rejoined as he has done; because if the traverse be bad the replication is bad, and the defendant is intitled to judgment on the plaintiff's replication. I doubt, however, whether it would have been safe for the defendant to have done that which would have permitted the averment to stand confessed, of the fine levied by the three co-parceners to the use of *Lomax* in fee. If that be a substantive allegation, he has met it; if it be not, then the plaintiffs having admitted the title in *Killigrew* and the descent from him, have shewn nothing to avoid it, or to support any right in themselves, and the replication is no answer to the plea.

The fourth plea states the right correctly and truly, and is also agreeable to a former judgment of this court on the same right of the same parties. There is but one objection made to it, namely, that it is pleaded that the co-parceners *did* not agree to present, and therefore that on the first avoidance the presentation belonged to the eldest. The argument is, that in the language of many books and some pleadings, the right of presenting by turns is said to arise when co-parceners *cannot* agree, and many authorities have been quoted

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1790. to prove this position. It is also laid down in *Bro. tit. Present. al Eglise*, 19. *Fitz. Nat. Brev. Qua. Imp.* 81. *Co. Litt.* 166. b. *Doct. and Student*, b. 2. c. 30. and it is clear law, that the first presentation in such case of mere right belongs to the eldest, descends to her issue, goes to her husband by the curtesy, and passes by her grant. The expression then that they *cannot* agree, therefore the exercise of the right must be by turns, is generally true. It is a legal presumption, that on a right so circumstanced they cannot agree. The eldest has it *plene jure*, and the concurrence of the others would only operate to their own prejudice. But it is not a position of fact that they cannot agree, nor could any issue be taken upon it. If they do not agree, the eldest must present in the first turn; an actual agreement can alone prevent it. No authority has been cited to shew it to be bad pleading to state that they *did not* agree; on the contrary, in the case of this very advowson the phrase in the pleadings is distinctly, that they "*did not* agree," and the court in giving judgment reason upon it as being precisely synonymous with "*could not* agree." Besides this, in a plea in bar, certainty to a common intent is sufficient. On this ground, therefore, the fourth plea is well pleaded, and on that also there must be Judgment for the defendant (a).

(a) [See post. p. 530. as to the question of costs.]

The following Case was cited in the Argument from the MSS. of Mr. Justice BURNET.

BARKER and COOK v. The Bishop of LONDON,
LOMAX, and BELLAMY,

Mich. 26 Geo. 2. C. B.

In a *quare
impedit*
brought
against *A.*
and *B.* tenants
in
common of
an advowson
being assign-

THIS was an action of *quare impedit* brought by *Edward Barker and James Cook* (in which *James Cook* was summoned and severed) against the *Bishop of London, Caleb Lomax, and Daniel Bellamy* his clerk.

The declaration stated, that *John Ellis* was seised in fee of the advowson in gross of the vicarage of *St. Stephen's*, near *St. Dunstons*, who do not agree to present, *A.* suffers judgment by default, and *B.* dies pending the writ. This judgment is a bar to another *quare impedit* brought by *A.* and *C.* the representative of *B.* (in which *A.* is summoned and severed,) to recover the same presentation, but is not a bar to *C.*'s right to recover on the next avoidance in his turn. [This case is reported in *Willes's Rep.* p. 659. and the point of it is thus stated by Mr. *Durnford* in the margin. "If *A.* and *B.* co-parceners in an advowson do not agree to present on a vacancy, *A.* the eldest (or her assigns) may present to the first turn, and *B.* or her assigns to the next. And if, when *A.* and *B.* do not agree, *C.* (a stranger) implead *A.* only, by *quare impedit* on a vacancy, and recover, it is a bar to a *quare impedit* brought by *B.* against *C.* for that turn, though not for the next turn."]

Alban's

Alban's, and presented one *Thomas Perkins* his clerk, who was thereupon admitted, instituted, and inducted; that *John Ellis* by his will of the 30th of *June* 1680, devised the advowson to *Rebecca* his wife for life, remainder to his second son *Thomas* in tail male, remainder to his third son *John* in tail male, remainder to his fourth son *James* in tail male, remainder to the heirs of his second son *Thomas* for ever. *John Ellis* died. *Rebecca* died in 1682.

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Thomas Ellis in *Michaelmas* term, 2 *James* 2., by bargain and sale inrolled, conveyed this advowson by the name of all that capital messuage or late dissolved hospital of *St. Julian* with the appurtenances, and the advowson of the parish church of *St. Stephens*, to *John Dod* and *John Reeve* in fee; against whom a common recovery was had in that term, in which *Thomas Ellis* came in as vouchee, which was to the use of *Thomas Ellis* in fee. In *Hilary* term, 2 *William & Mary*, a fine was levied by *Thomas Ellis* and *Mary* his wife, to *Henry Killigrew*, to the use of *Henry Killigrew* in fee.

Thomas Perkins died the 1st of *May* 1693, and by his death the said church became vacant; which church remaining vacant for 18 months, King *William* the Third by lapse presented *John Fothergill* in 1695, who was admitted, instituted, and inducted. *Henry Killigrew* by his will 8th *December* 1704, devised this advowson to his wife *Lucy* for life, and died in *December* 1712, whereby his widow *Lucy Killigrew* was seised for life of the advowson, with a remainder in fee to his three daughters, *Lucy*, *Mary*, and *Judith*, as co-parceners.

Lucy Killigrew the mother, by indenture of the 28th of *August* 1716, on an intended marriage of her daughter *Lucy* with *James Cook*, (one of the plaintiffs in this writ,) and the said *Lucy* the daughter conveyed one third part of the advowson to trustees, to the use of *Lucy* the mother for her life, remainder to the use of *James Cook* for his life, remainder to the use of *Lucy* the daughter for life, remainder to trustees for their lives, to preserve contingent remainders, remainder to the first and every other son in tail male, remainder to their daughters as tenants in common in tail, remainder to the heirs of *James Cook* in fee.

In 1726, *Mary* the daughter married *Edward Barker* father of the present plaintiff. In *October* 1728, the church became vacant by the death of *John Fothergill*, on which one *Caleb Lomax*,

1790: *Lomax*, by usurpation on *Lucy Killigrew* the mother, presented *John Romney*, who was admitted, instituted, and inducted.

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of LONDON. *Lucy Killigrew* the mother died in 1729, whereby *James Cook* being seised during his life, of one third part of the advowson, with remainders over as aforesaid; *Edward Barker* in right of his wife became seised in fee of one other third part, and *Judith Killigrew* in her own right was seised of the other third part. On the 8th of *June* 1730, the church became vacant by the resignation of *John Romney*, whereupon the king by usurpation presented the said *John Romney*, who was thereon admitted, instituted, and inducted.

Judith Killigrew by her will of the 10th of *May* 1731, devised her third part among other things, to trustees to pay and dispose the rent, issues, and profits thereof to such persons and to such uses as *Mary Barker* during the coverture should appoint, exclusive of her husband; remainder after *Mary's* decease to the present plaintiff, in tail male, with remainders over, and afterwards, *viz.* on the 18th of *June* 1731, the said *Judith Killigrew* died.

In *May* 1734, *Mary Barker* died, whereupon *James Cook* became seised for life of one third part, *Edward Barker* the father of one other third part for his life, and *Edward Barker* the present plaintiff of one other third part in fee tail; and afterwards the church became vacant by the death of *John Romney*, whereby it belonged to those three to present.

During the vacancy, on the 28th of *November* 1747, *Edward Barker* the father died, whose third part thereupon came to *Edward Barker* the plaintiff: that it belonged to *James Cook* and him to present, but that the *Bishop*, *Caleb Lomax*, and *Daniel Bellamy* unjustly hindered them, &c.

The *Bishop* claimed nothing but as ordinary, &c.

The defendant *Caleb Lomax* pleaded four pleas.

1st. He pleaded a special title under a recovery, and traversed the seisin in fee of *John Ellis*.

2d. He pleaded the same title, and traversed that *Thomas Perkins* was instituted to the church on the presentation of *John Ellis*.

3d. That in *Michaelmas* term, in the 20th year of the reign of *Geo. 2.* he brought a *quare impedit* in this court against the *Bishop of London*, *Daniel Crispin*, clerk, *James Cook*, (one of the plaintiffs to the present writ,) and *Edward Barker* the father, in his life-time; and in *Hilary* term in the 21 of *Geo. 2.* by the consideration

consideration of the court, recovered against the said *James Cook* 1790.
 his presentation to the said vicarage, *by default of the said James*
Cook, and in the *Easter* term following declared against the *Bishop* BARKER
 and *Daniel Crispin*, and had a verdict and judgment, and a writ v.
 to the bishop, to institute a fit person at his presentation: that The Bishop
 his clerk *Daniel Bellamy*, one of the now defendants, was ad- of LONDON.
 mitted, instituted, and inducted; it was then averred that *James*
Cook, *Edward Barker* the father, and the now plaintiff, and since
 the decease of *Edward Barker* the father, *James Cook* and the
 now plaintiff, *never did agree* among themselves, to present a
 fit person, wherefore he prayed judgment, &c.

The 4th plea traversed that the fine between *Henry Killigrew*
 and *Thomas Ellis* and *Mary* his wife was levied to the use of
Henry Killigrew and his heirs, on which issue was joined.

The defendant *Bellamy* pleaded the same pleas.

The plaintiff replied to the several pleas of each:

1st. That *John Ellis* was seised in fee, and on that issue
 joined:

2d. That *Thomas Perkins* was instituted into the church at the
 presentation of *John Ellis*, on which issue was joined:

3d. To the third plea there was a general demurrer, in which
 the defendant joined:

This was argued upon the demurrer, by

Bootle, Serjt. and at another day by *Prime*, Serjt. for the
 plaintiff, who contended that a recovery in *quare impedit*, even
 after plenarty by it, was no bar to the right of a stranger.
Kilw. 46. a. 6 Co. 48. b. *Boswel's* case. The right of presentation
 or advowson is an entire thing, and one co-parcener, or tenant in
 common, cannot bar the other. That it is an entire thing, is
 holden in *Co. Litt.* 197. b. and that the one cannot bar the
 other by non-appearance or release, is laid down, 2 *And.* 48 &
 49. In case of a thing entire, and in the realty, as the present-
 ation of a church, the release of one shall be only a bar to his
 part, but shall enure to the benefit of the other, who shall recover
 the whole presentation. 5 Co. 97. b. *The Countess of Northum-*
berland's case. In this case the default of *Cook* in the former
 action is to be considered as a fraud, which cannot injure the
 present plaintiff who was no party to that suit. If he had been
 a party, he might have had judgment, and a writ to the bishop
 notwithstanding *Cook's* default; for if several defendants be, and
 one makes default, there is a writ to the bishop awarded against
 him; but if there is judgment for the other defendant, he shall

1790. have a writ to the bishop against the plaintiff by the common law. 2 *Inst.* 124, 125. *Jenk.* 2. *Cent.* 95. (a) As to the averment that the co-parceners or tenants in common, did not agree to present a fit person, that is wholly immaterial; for though after a partition they may bring their separate actions of *quare impedit*, each for their respective turn, yet before partition, even after a composition to present by turns, they must join in the writ, 2 *Inst.* 365. *Keilw.* 1. But when *Cook* is summoned and severed in a joint writ, *Barker* sues for his own presentation alone, and *Cook* has no interest in the suit. 2 *Roll. Abr.* 350. (b) 1 *Roll. Rep.* 242. The same rule holds in the case of ravishment of ward; and also in debt by two executors. *Dy.* 319. (b)

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Draper, Serjt. and at another day *Pool* Serjt. for the defendant argued, that though it was true that three co-parceners in law make but one person, and that after summons and severance, one co-parcener shall recover alone, yet the title is always joint. The *stat. Marlbridge*, cap. 12. says, That if the disturber makes default, there shall be a writ to the bishop, "*quod reclamatio impeditoris illâ vice conquerenti non obstat, salvo impeditori aliâs jure suo, cum indè loqui voluerit.*" By which it appears that the defendant loses his right of presenting *illâ vice* for that turn, with a saving of his right at another turn.

Here is a joint right in three as tenants in common, assignees of three co-parceners. A suit is brought against two of them, one dies pending the suit, the other suffers judgment against him by default, the third is no party to the suit. The defendant against whom judgment was recovered, has lost all his right to that presentation, to *Lomax* the plaintiff in that suit. If so, and the tenants in common were assignees of co-parceners, who could not agree to present, which is admitted by the demurrer, whose turn was it to present? It was *Cook's* turn as assignee of the eldest sister, 2 *Inst.* 365. *Co. Litt.* 186. b. But supposing this point were not so, and that they were barely tenants in common, the advowson being one entire thing, the presentation of one, if accepted, serves for them all; so the recovery against one bars all from suing for that turn. The recovery against *Cook* is peremptory for that turn against him, and all claiming with or under him. *Moore*, 81.

If therefore *Cook* be a disturber for that turn, and peremptorily so by his own default, how can any one set up a title to present to that turn in the right of *Cook* and himself? How will

(a) Case 85.

(b) Pl. 8.

the judgment be peremptory against his claim *pro illâ vice*, if that may be done? It is said that the present plaintiff was no party to the suit against *Cook*; but he was privy to the title of *Cook*. *Lomax* had no reason to make the present plaintiff a defendant in that action, as *Cook* and *Barker* the father presented and were disturbers. Upon the whole it seems clear, that no title can be set up to this turn in *Cook*, or jointly with him; and that *Barker* has no right to this presentation upon this record, since *Cook*, as assignee of the eldest sister, is intitled to this turn, and might have brought his *quare impedit* against *Barker* the plaintiff had he hindered him. *Co. Litt.* 186. There is no ground therefore for the plaintiff to recover this presentation.

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The court were unanimous in the following judgment :

If this had been the case of mere tenants in common, it would have been more doubtful, for the advowson in that case is one entire thing, not in its nature severable but by partition. There if one releases it shall enure to the benefit of the other. 5 *Co.* 97. So if two tenants in common be sued in *quare impedit*, one makes default, and the other appears, if he hath judgment, he shall have a writ to the bishop, though on default the plaintiff is intitled to a writ to the bishop against him who made default. 2 *Inst.* 124, 125. So if two tenants in common sue in *quare impedit*, one is nonsuited, the other shall recover, *Co. Litt.* 197. b. But though these rules are laid down where two joint-tenants or tenants in common are parties as plaintiffs and defendants to the same suit, yet there is no case, where one joint-tenant or tenant in common is sued or sues alone, and after a recovery against him, be it in chief, or by default, and a writ to the bishop, it hath been held that the other may sue with him, summon and sever him, and recover that very presentation. For it should seem, that as the presentation of one joint-tenant or tenant in common, will be a presentation in the right of all, so a recovery by default against one joint-tenant, or tenant in common, will be a bar for that presentation to all. 2 *Roll. Ab. Present.* 372. pl. 1 & 2. 373. pl. 12. However then the case may be, with respect to mere joint-tenants, or tenants in common of an advowson, it is clear as to the case of co-parceners; though they may join in a *quare impedit*, yet upon their not agreeing to present, the law considers their right of presenting as severed by a partition to present by turns, as much as if they had actually made such a composition; therefore though tenants in common must join in *quare impedit*, co-parceners need not.

1790. 5 Hen. 7. 8. pl. 17. If they cannot agree, it is of common right that the eldest shall present on the first avoidance; the second on the second, the third on the third, and so on. 2 Roll. Abr. 346. pl. 1. This privilege goes to the issue or assignee in law, or in fact, of co-parceners, such as the grantee, or tenant by the curtesy. 2 Roll. Abr. 346. pl. 2. and 3. Co. Litt. 167. b. Moore, 225. And if any of the co-parceners be disturbed by the other, or their assigns, she may bring *quare impedit* against them. Suppose then a lapse incurs, where persons have a right to present by turns, it is held that only the right of the person who had then a right to present, shall be lost. Bro. Present. pl. 26. So if there are four co-parceners, the eldest and second present, a stranger usurps on the third; this usurpation will only affect that turn, and the fourth may present when his turn comes, and if disturbed bring *quare impedit*; for the usurpation only displaced the turn of the third. Bro. Qua. Imp. pl. 118. Suppose Cook had granted away his turn, would not his grantee be thereby intitled to his turn against Barker? and is there a stronger way of granting, than by suffering a judgment against him and execution for this turn by Lomax as is here done? Why is an usurpation against a bishop no bar to his successor, though it is to himself? Because by 1 Eliz. (a) a bishop cannot grant away such an advowson, Cro. Jac. 673. Sir W. Jones, 45. S. C. where a recovery without title by default, against a former bishop of Ely, was held not binding on his successor. In this case therefore, the recovery against Cook is to be considered as a grant of his turn, or an usurpation on his turn only, and therefore conclusive to Barker, who has no right to his turn, unless they had agreed to present, which is not averred, and not denied that they did not. This recovery therefore is peremptory for this turn, but will be no bar to Barker recovering the presentation at the next avoidance.

Judgment for the defendant.

(a) c. 19.

Saturday,
May 15th.

ARTHRINGTON and HARDCASTLE v. The Bishop of
CHESTER, and JACKSON, Clerk.

Where the
grant of a
rectory by
the crown
contained an
exception of
all churches and vicarages thereto belonging,
a perpetual curacy belonging to the rectory
passed by the grant, not being included in the exception.

QUARE *impedit*. The declaration stated, that the defendants were summoned to answer the plaintiffs of a plea, that they permit the plaintiffs to present a fit person to the perpetual

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curacy of the church of *Coverham*, in the county of *York* and diocese of *Chester*, &c. That one *Thomas Hardcastle* was seised of five undivided sixth parts of the impropriate rectory of the parish church of *Coverham*, and one *Richard Geldart* of the other undivided sixth part of the said rectory in the demesne as of fee as tenants in common, and not as joint-tenants, to which said rectory the nomination and appointment of the curacy of the parish church of *Coverham* did belong and appertain, and doth yet of right belong and appertain; that the said *Thomas Hardcastle* and *Richard Geldart* being so seised, and the curacy being vacant, they nominated and appointed one *Christopher Lonsdale* clerk to the said curacy, who on that nomination and appointment was licensed by the then Bishop of *Chester* to the said curacy and to be the curate thereof in the time of *Geo. 2.* that in the 12th year of the reign of *Geo. 2.* a *fine sur cognizance de droit come ceo*, &c. was levied by the said *Richard Geldart* and his wife of his undivided sixth part of the said rectory of *Coverham* with the appurtenances, &c. to the use of the said *Thomas Hardcastle* in fee, who thereupon became seised of the whole rectory in fee: that *December 7th*, 1743, the said curacy was augmented by queen *Anne's* bounty: that *December 3d*, 1750, the said *Thomas Hardcastle* by a deed poll granted to the present plaintiffs, the right of nomination to the said perpetual curacy, when the same should first and next become vacant by the death or resignation of the said *Christopher Lonsdale*; that *December 26th*, 1788, the said curacy became void by the death of the said *Christopher Lonsdale* and yet is vacant, and by reason thereof it belongs to the plaintiffs to nominate, &c.

Plea by the bishop as usual, that he claimed nothing but the admission, &c. as ordinary, &c.

Plea by *Jackson* the clerk, that he is curate on the presentation, nomination, and appointment of our lord the present king duly licensed, &c. that *King Geo. 1.* was seised of the advowson, right of presentation or nomination, and appointment of and to the perpetual curacy of the parish church of *Coverham* as of one in gross by itself as of fee and right in right of his crown of *England*; that the curacy being vacant, he presented, nominated and appointed one *Humphry Dickenson* clerk to the said curacy, who was licensed by the then Bishop of *Chester*, and duly admitted to the curacy in the time of *George 1.*: that *Geo. 1.* died so seised, on whose death the advowson, right of presentation, &c. descended and came to *Geo. 2.* who was seised, &c.: that the

E c 2

curacy

1790.

ARTHINGTON
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of CHESTER.

1790. curacy became vacant by the death of *Humbry Dickenson*; on whose death the said *Thomas Hardcastle* and *Richard Geldart* usurping upon the right of *Geo. 2.* nominated and appointed the said *Christopher Lonsdale* to the said curacy, &c.: that *Geo. 2.* died so seised, on whose death the advowson, &c. descended and came to our lord the present king as grandson and heir of *Geo. 2.* whereby he became seised, &c. and being so seised the curacy became vacant by the death of *Christopher Lonsdale*, whereupon it belonged to the present king to present, &c. Without this, that the nomination and appointment to the curacy of the parish church of *Coverham* aforesaid, belonged and appertained to the said rectory in manner and form as the said plaintiffs have above alleged, &c.

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Replication in the common form to the plea of the bishop, with judgment and a *cesset executio* till the plea between the plaintiff and *Jackson* the clerk be determined.

Replication to *Jackson's* plea, took issue on the traverse, of the nomination and appointment to the curacy belonging to the rectory of *Coverham*, &c.

This issue came on to be tried at the last summer assizes, for the county of *York*, when a verdict was found for the plaintiffs subject to the opinion of the court on a case, which stated,

That in the reign of *Hen. 3.* the rectory of *Coverham* was appropriated to the abbey of *Coverham*, and from that time to the time of the dissolution of the abbey, the parish church of *Coverham* was served either by some of the monks, or by some person whom they employed, there not appearing to have ever been a vicarage endowed.

Upon the dissolution of the abbey in the 27th year of *Hen. 8.* the same with all its members and appurtenances came to the crown, and continued in the crown till the 5th year of *Ed. 6.* when that king by letters patent granted the same to *John Ward* for 21 years by the following description: "*Totam rectoriam*
" *ecclie (ecclesie) p̄chial (parochialis) de Coverham, cum pertina-*
" *(entiis) in com(itatu) suo Ebor(acensi) Abbie (Abbatie) de*
" *Coverham in eodem com(itatu) auctoritat(e) parliament(i) su-*
" *press(æ) & dissolut(æ) quondam spectant(em) & pertinent(em),*
" *ac omnia domos, edificia, horrea, terr(as) glebas, oblatiões,*
" *(oblaciones,) obventiões, (obventiones), proficua, commoditat(æ)*
" *et emolumenta quæcunq eidem rector(iæ) quoquomodo spec-*
" *an(tia) five pertinen(tia); except(is) tamèn semp'(er) nobis*
" *heredibus et successoribus nostris omninò reservat(is), om-*
" *nibus*

"nibus boscis et suboscis, de in et' super pmissis (*præmissis*) 1790.
 "crescen (*tibus*) et existen (*tibus*), ac * *advocat' vicar (iæ) ecclie*
 " (*ecclesiæ*) de Coverham prædict (æ) hend (*habendum*) et tenend.
 " (*tenendum*)," &c. reserving an annual rent of 20 l. &c.

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Queen Elizabeth, by letters patent, in the 14th year of her reign, after reciting the above grant of Ed. 6. in consideration of 855 l. 12 s. granted to Thomas Allen and Thomas Freeman "Revecōem (*Reversionem*) et revecōes (*reversiones*) pēdict (prædictæ) rector(iæ) ecclie (*ecclesiæ*) pōchial (*parochialis*) de Coverham cum ptin (*pertinentiis*) ac pēdicōr (*prædictorum*) domor(um) edific(iorum) horreor(um) terr(arum) gleb(arum) decim(arum) oblac' (*oblationum*) obvenc (*obventionum*) pfic' (*proficuum*) commoditat(um) et emolument(orum) quor'cunq (*quorumcunque*) eidem rector(iæ) quoquomodo spectan- (tium) five ptinent (*pertinentium*)," &c. &c. These letters patent then went on to grant the whole rectory of Coverham to Allen and Freeman with the several appurtenances described (but without mentioning the vicarage) and at the end of the description contained the following clause. "Ac omnia alia com- moditates et emolumenta quæcunq, eidem rcōrie (*rectoria*) quoquomodo spectan(tia) five pertin'(entia) aut ut membr(a) ptes (*partes*) vel pcell (*parcella*) ejusdem rector(iæ) hī- (habita) cognit'(a) accept(a) usitat(a) et reputat(a) existen- (tia) modō vel nup(er) in tenur(d) five occupa'coe(occupat- tione) pe'dci (*prædicti*) Jōhis (*Johannis*) Ward," &c. &c. Then followed, "Nec non totam illam rc'oriam (*rectoriam*) nrām (nostram) de Iforde cum omnibus suis p'tin (*pertinentiis*) in com- (itatu) nro (*nostro*) Suffex," &c. with a particular † enumeration of the appurtenances belonging to the rectory of Iford, to have and to hold the said rectories of Coverham and Iford in as full and ample a manner as any abbot of Coverham, or the former owners of the rectory of Iford (naming them) had enjoyed the same.

"Except(is) tamen semp(er) et extrà presentem concessionem n'ram (*nostram*) nob(is) hered(ibus) et successoribus n'ris (*nostris*) omino reservatis omnibus campanis, et toto plumbo, de, in, et super præmissis existent(ibus) præter plumbeas gutturas, et plumbum in fenestris eor'dem (*eorundem*) pre- miss(orum) ac etiam omnius advocāc (*advocationibus*) rector-

* It is obvious, that if this abbreviated word be here used in the ablative case, the avowson of the vicarage is included in the exception; if in the accusative, that it passed by the grant.

† But did not mention the vicarage of Iford.

1790. " (*iarum*) vicar(*iarum*) et ecclīār (*ecclesiarum*) premiss(is) seu
 " eor(um) alicui spectan(tium) seu pertin(entium) nob(is) he-
 ARTHING- " red'(ibus) et successoribus nris (*nostris*) simili modo except(is)
 TON. " et reservat(is)," &c.

The Bishop
 of Chester.

The case farther stated, that during the time the rectory of *Coverham* remained in the crown, an annual pension of 5 *l.* 6 *s.* 8 *d.* was paid by the crown to the person who was chaplain and curate for the time being of the parish church of *Coverham*.

That there was a vicarage at *Iford* at the time of the above grant of Queen *Elizabeth* to *Allen* and *Freeman*.

That in 1642 *Thomas Dickinson* was licenced to serve the curacy of *Coverham* on the presentation of *William Hardcastle* and *Thomas Horner* impropiators.

That in 1691 *Thomas Odūe* was licenced to serve the curacy of *Coverham*, but it did not appear on whose nomination.

That between the years 1691 and 1708 (the exact time not appearing) *John Turner* was licenced to serve the curacy of *Coverham*.

That in 1708 the said *John Turner* was instituted to the rectory and vicarage of *Coverham*, on the presentation of Queen *Anne*, patron *per lapsum temporis*.

That in 1727, on the supposed death of the said *John Turner*, *Humphry Dickinson* was instituted to the vicarage of *Coverham* on the presentation of King *George 2.* patron *pleno jure*. That *Turner* afterwards appeared and claimed the church, upon which *Dickinson* gave it up.

That in 1737, while the said *Turner* was in possession of the church, *Christopher Lonsdale* was nominated to the curacy of *Coverham* by *Thomas Hardcastle* and *Richard Geldart* impropiators.

That by a process in the consistory court of *Chester*, the said *Turner* was dispossessed, and that in 1739 the said *Lonsdale* was licenced to the curacy of *Coverham*, which he enjoyed till his death in 1789.

On the part of the plaintiffs, *Lawrence*, Serjt. argued in the following manner: The question in this case is, Whether in the exception of the advowson of "all rectories, vicarages, and "churches," contained in the grant of Queen *Elizabeth*, the right of nominating a curate to the church of *Coverham* be included? The several nominations and presentations which have taken place subsequent to that grant, are no farther material than as

the

the usage may operate to explain the grant. For the *quare impedit* is brought to recover the nomination to the curacy, and the plea of the defendant *Jackson* is, that he is curate on the nomination of the king. But there are two points which seem clearly in favour of the plaintiffs; 1st, That under the words of the exception, considered without relation to the usage, no right was reserved to the crown of naming the curate; 2d, That the usage, as far as it is found, operates against the defendant.

. It is stated that the appropriation was made in the reign of *Henry 3.* and that prior to the dissolution of the abbey of *Co-verham*, the church was served by some of the monks, at which time there does not appear to have been any vicarage endowed, It is also stated, that during the time the church was in the hands of the crown, a pension was paid by the crown to the curate. Upon this state of the case it appears, that when the lease was made by *Ed. 6.* and the reversion granted by *Eliz.* there was no vicarage in existence upon which the exception could operate. The question then comes to this, Whether, as there was no vicarage, properly speaking, to which the exception could be applied, it did not mean, and may not be understood to reserve to the crown the right of nominating the person who was to perform the spiritual office, though such person were only chaplain or curate? The great difference between rectories appropriate and those which are not is, that in the latter the rector is for life, in the former, perpetual. *Plowd.* 495. 2 *Roll. Abr.* 341. Where there is no vicarage endowed, the appropriation is as to the service of the church, in the same state as before the passing the 15 *Ric. 2. c. 6.* & 4 *Hen. 4. c. 12.* As the rector cannot himself execute the duty, he must find a clerk to perform the office for him. Prior to those statutes the persons employed were removable at the will of the rector, and had no claim to any salary but such as was agreed upon with the rector. *Gibf. Cod.* 717. 1 *Burn's Ecc. Law*, 71. 2 *Burn's Ecc. Law*, 71. 1 *Blac. Comm.* 387. *Burb.* 273. Nor has a curate now any interest for which any remedy is given by law, except an action for work performed on a *quantum meruit*. To such an office as this, the terms of the exception are in no degree applicable. An advowson is the right of presentation or collation to a church. *Co. Litt.* 119. *b.* Every church is either presentative, collative, donative, or elective. *Ib.* A *quare impedit* may be sued *de ecclesiâ*, which always imports a rectory or parsonage,

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1790. *F. N. B.* 76. A curate signifies a clerk not instituted to the cure of souls. 2 *Burn's Ecc. Law*, 52. But to a curacy there is neither presentation nor collation. The term advowson is never applied but to a benefice, which formerly a curacy was not. In times when the feudal system prevailed institution took its rise; the ecclesiastical law considered benefices as analogous to lay fees, and therefore required institution to be made by the bishop. But where there was no benefice no institution was necessary; and no curate was ever instituted to an office which he held merely at will.

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The term vicarage, which at the time of the grant had a known defined sense distinct from its original meaning, implied an office to which institution and induction were necessary according to stat. *Rich. 2. & Hen. 4.* There may be, strictly speaking, an advowson of a vicarage, but the term advowson can neither be applied to a curacy, nor by fair construction be holden to mean it. The only argument which can be used on the other side is, that unless the words mean a curacy they mean nothing, there being no vicarage at *Coverham*. The answer to this is, that the words were used *ex majori cautela*, and that the officers of the crown inserted them lest there might possibly be a vicarage at *Coverham*, as there clearly was at *Isford*. This evidently appears from the word *rectoris* being used in the same sentence, and that they made the exception as of course, without attending to the import of the words; for the exception extends to the very subject of the grant, namely, the rectory. In *Hob.* 303. it is laid down that grants are to be construed according to their plain and easy sense; in 10 *Co.* 105. *b.* it is said that every exception and reservation is to be strictly construed. In *Co. Litt.* 47. *a.* the difference is marked between an exception, which is ever part of the thing granted, and of a thing *in esse*, and a reservation, which is always a thing not *in esse*, but newly created or reserved out of the land or thing demised. But here there was no new creation of a vicarage.

This rule holds even in construing grants made by the crown, as in cases of patents granted according to 43 *Eliz. c. 1.* which are to be taken most strongly in favour of the patentee. The meaning indeed of that maxim of law, which says that the grants of the crown shall be strictly construed, is, that they shall not exceed the intent of the crown, and shall be expounded most for the honor of the crown. Nor is it probable from the nature of the thing, that to a curacy without a certain salary or any fixed emolument,

lument, the crown should wish to retain the right of appointment; and in a case too where the person appointed could not have any remedy whatever to obtain his office. At common law no remedy would lie, and it was not till the stat. *Geo. 1. c. 10.* was passed, which put augmented curacies upon a footing with other benefices, that a *quare impedit* could have been brought. Tho' a *mandamus* would go to compel the bishop to licence, yet it could not oblige the appropriator to admit an officer who held at will. But whatever might have been the intention of the crown, it had no power to reserve the presentation to the curacy out of the grant of the rectory. The nomination of the curate could not be separated from the rectory. *Dyer, 58. b.* Before the dissolution of monasteries, all rectories now impropriate were in the hands of religious houses, who in contemplation of law (where there was no vicarage endowed) were in every sense the rectors of parishes, and were considered as themselves discharging the duties. From them the right of naming a curate could no more be separated, than from a rector at the present day. This could not now be done; a condition of that kind in a presentation would be void. If so, it could not have been good in the case of a religious house. By becoming appropriator the house possessed all the qualities, and was liable to all the burthens of parson. It became responsible to the bishop, and liable to his process for neglect of duty. No instance can be found of a separation while the religious houses continued. On the dissolution of those houses, the appropriations were vested in the crown or its grantees to hold in the same manner as the religious houses held them. *Stat. 27 H. 8. c. 28. f. 2. & 31 H. 8. c. 13. f. 2.* No new character was created, but the impropriator becoming rector stood in the same situation as the monastery did before: he was the only person to whom the law looked for a performance, and against whom it could proceed for a neglect of the duties. It seems a necessary consequence, that he who is punishable for neglect of duty, and on whom the law imposes certain burthens, should have the sole power of appointing his substitute, when he cannot himself personally discharge the office.

But if on the other hand it should be argued, that when the nomination of the curate is transferred to another, the rector is no longer answerable for the discharge of the duty, or punishable if no curate be appointed; the consequence would be, that there might be no means of compelling the performance

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1790. of the duty. The person to whom the right belonged might be unknown, or out of the reach of ecclesiastical censures. He might have no *bona Ecclesiastica* liable to sequestration. Before the passing the stat. 1 Geo. 1. §. 2. c. 10. which held curacies to be ecclesiastical benefices, no lapse incurred for not nominating to a curacy; nor had curacies any of the qualities necessary to an inheritance. Whatever could have been reserved to the crown capable of descent, must have been either a corporeal or incorporeal hereditament. But the right of appointing a curate is no more an hereditament than the right of appointing any other servant.

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With respect to the usage, the first presentation made by the crown was merely *per lapsum temporis* to the rectory: the second was wrongful, and the presentee was in fact removed by the persons claiming under the grant of Queen Elizabeth, so that there appears no act of the crown exercising the only right which, it is now contended, exists.

Le Blanc, Serjt. for the defendant. The question, as it is said on behalf of the plaintiffs, arises from the construction of the two grants of Ed. 6. & Eliz. which must be construed together; and the question is, Whether the curacy which was separated from the rectory by the reservation in the grant of Elizabeth can again become appurtenant? Now it is a clear rule of law, that an advowson or the like which was appurtenant and has been once severed from the principal, can never afterwards become appurtenant, though it should come again into the same hands. 2 Mod. 1. With respect to the argument, that the king's grants shall be construed in favour of the grantee, it is contrary to the general rule of construction. *Plowd.* 243. But another rule is, that all the words of a grant shall, if possible, take effect. In the grant of Ed. 6. the words of the exception cannot be operative, unless they mean the curacy. When the monastery was dissolved, it came to the crown, from which an annual stipend was paid to the curate, but there was no vicarage belonging to it. If the words therefore of the exception in this grant do not mean the curacy, they can have no effect, there being no vicarage at *Coverham*. In the grant of Elizabeth the exception is of all advowsons of vicarages and churches, &c. in the plural number; this seems to have been done by design, as there was a vicarage at *Iford*, and with reference to the exception in the grant of Ed. 6. which is in the singular number, and could only be applicable to the curacy. The exception therefore

therefore in the grant of *Elizabeth*, comprehended the vicarage of *Iford*, and all that it could mean to comprehend at *Coverham*, namely the curacy. As to the argument, that the term advowson is inapplicable to a curacy, it certainly may be understood to mean the patronage which the founder of the church originally had, whether it were a donative, or the right of presentation or nomination. Originally the office of vicar and curate were the same, whether called *vicarius*, *capellanus*, or by any other appellation. Those persons who discharged the duty of the rector were so described. A vicar was one who performed the service of the church *vice rectoris*; so also was a curate. In the term "vicarages" therefore a curacy might well be included, as a vicarage and a curacy were in effect the same office. With respect to the argument, that as a stipendary curate was not instituted to his office, therefore the term advowson could not be applied to a curacy; the same argument would go the length of proving that there could be no advowson of a donative, because to a donative no institution is necessary. As to the authority cited from *Hobart*, 303. that was not the case of the construction of a grant of the crown, but only whether an advowson passed by the words "commodities, emoluments, profits, and advantages," which the court held it did not. The same answer may be given to 10 *Coke*, 105. which was not on a question between the crown and the subject, but between subject and subject. As to the 43 *Eliz. c. 1.* that was passed for the particular purpose of the patentees of the crown. It was stated on the other side, that though the object of the crown might be to reserve the nomination of the curacy, yet that it had no such power, because it was inseparable from the rectory. But what is the issue? If the curacy could not be severed from the rectory, the issue must fail. It is stated to have been appurtenant to the rectory; if so, it might clearly have been severed. Admitting that where the impropiator does not appoint the curate, he is not answerable for a neglect of duty, it proves nothing more than this, namely, that if the appointment be taken away, responsibility is also taken away. The case in *Dyer*, 58. *b.* was merely between lessor and lessee. With respect to the assertion, that this is neither a corporeal nor incorporeal hereditament, yet it is as much incorporeal as the advowson of a vicarage, and equally capable of being reserved to the grantor, his heirs and successors.

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As to the usage, there is no evidence of what was done from 1561 to 1642, a period of near eighty years; but of the instances which are given of the several nominations, two were made by the crown, and it is uncertain by whom those of 1691 and 1758 were made.

Cur. vult advis.

Lord LOUGHBOROUGH.—In this case it is stated, that after the dissolution of religious houses the abbey of *Coverham* was demised by *Ed. 6.* to one *Ward* for 21 years, and that in the grant, after the demise of the rectory there is an exception of all woods, underwoods, and a devise of the advowson of the vicarage of the church of *Coverham*: that the reversion expectant on that term for years was sold by *Queen Elizabeth* to *Allen* and *Freeman*. The letters patent of *Eliz.* are set forth, which begin by reciting the former devise, and then the Queen grants the reversion of the rectory with the appurtenances as before specified in the patent and the demise for years. After this, there is a grant of the whole rectory with a very ample description and all general words of grant, which concludes with granting it to *Allen* and *Freeman* in as full a manner as it was possessed by any abbot of *Coverham*. This undoubtedly grants expressly more than was contained in the terms of the demise to *Ward*, because it directly grants the woods and underwoods which were excepted out of the demise to ward. It then mentions a grant of the rectory of *Iford*, in the county of *Sussex*; and at the close there is an exception of all advowsons of the rectories, vicarages, and churches belonging to the premises. The case goes on to state, that there was a vicarage belonging to the rectory of *Iford*, but none to the rectory of *Coverham*; but during the time the rectory of *Coverham* remained in the crown, an annual stipend of 5*l.* 6*s.* 8*d.* was paid by the crown to the curate. It is then stated that *Thomas Dickinson* was admitted to the curacy in 1642 on the nomination of the grantees; that in 1661, one *Oddie* was licensed by the diocesan to serve the curacy; that afterwards one *Turner* was licensed in the same manner, and that the same *Turner* in 1708 was instituted to the rectory and vicarage of *Coverham*, on the presentation of *Queen Anne* by lapse. The case next states, that in 1727, on the supposed death of *Turner*, one *Dickinson* was instituted to the vicarage of *Coverham*, on the presentation of *King George 1. pleno jure*, that afterwards *Turner*, who was not dead, nor had made any avoidance of the living, appeared, and claimed the church,

upon which *Dickinson* gave it up: that in 1737 one *Lonsdale* was nominated to the curacy by the impropiators, while *Turner* was in possession, who was afterwards dispossessed by process in the consistory court of *Chester*; and that by the death of *Lonsdale* there is now an avoidance.

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On this case the question for the determination of the court is, What passed by the grant of Queen *Elizabeth* to the persons under whom the present parties claim? for if all the interest in the rectory passed, the curacy, which is incident to the rectory, (I rather call it incident than appurtenant,) undoubtedly passed along with it. It is contended on the part of the plaintiffs, that on the true construction of the grant no exception can be intended of the curacy, and that if such exception had been inserted in the grant, it would have been void as repugnant to the grant itself, because the rector of a rectory impropriate, where there is no vicarage endowed, and no perpetual curacy, is obliged by law to find a curate to serve the church and give him a reasonable allowance. He may make the best terms he can, but that it is the duty of the bishop by ecclesiastical censures to compel the performance of the duty for the sake of the church. That question would lead pretty far, but it is immaterial to enter into the consideration of it, if on a thorough view of the grant, together with the facts of the case, there is no reason to say that the curacy was excepted. That to us appears to be the true construction, and confirmed by the usage. The grant of *Elizabeth* begins, as I before stated, with a recital of the demise to *Ward*; but it would not be just to conclude that it meant to give no more. It is manifest that *Ward* had not all which the grantees afterwards had, because there is an express reservation in the demise to him of a part which they enjoyed. He was to have the profits of the rectory paying a rent of 20 *l.* per annum during the term; but the transaction with *Allen* and *Freeman* was for an absolute sale at a large price paid. The grant does not stop short; it was necessary to recite the term because it was a grant in fee, and the purchaser under the crown acquired a right during the remainder of the term to the rent. It therefore begins with giving to the grantees the reversion after the term for years, and goes on in explicit and distinct words, granting this and all other commodities and emoluments whatever belonging to the rectory parcel of the possessions of the abbot of *Coverham*; it mentions expressly the woods, underwoods, and trees, and closes a very long recital of the particulars with the words

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words "in as ample a manner and form as any abbot of the " abbey of *Coverham* had possessed and enjoyed the same." The general exception which follows was to prevent dilapidations, which were at that time very common, to the destruction of churches. In the exception of the vicarage it is perfectly clear that the nomination to the curacy is not in terms included. Yet it is argued, that in a grant of the crown which is to be favourably construed, the court would extend the meaning to a reservation of the nomination to the curacy, if the words of the grant could justify that extension to be made. But the words of this grant hardly justify such an extension. If there had been an exception of the advowson of a vicarage specifically named in the grant of the rectory of *Coverham*, the argument would have had this ground to stand upon, namely, that something must be meant to be excepted, that as in reality (there being no vicarage at *Coverham*) the only nomination which could be made, was to the curacy, it must be implied that the curacy was meant, though improperly described as a vicarage. But that is not the case. The words in the grant are general and sufficiently answered, if there be a vicarage belonging to either of the livings. Now to one of the livings, to *Iford*, there is a vicarage belonging. That fully satisfies the words of the exception. They are not nugatory words, and it is not necessary in the construction of them that there should be an intention in the grant, to make any exception whatever relative to the rectory of *Coverham*. Besides this, there are subsequent words in the grant, which I think go pretty far to shew that this could not be the intention. For there is a provision on the part of the crown, to indemnify the purchasers from all burthens, charges, and rents which might be issuing out of the object of the grant, and a particular exemption from the payment of a pension of four shillings *per annum*, payable out of the rectory of *Iford* to the vicar. Now the nomination to that vicarage being intended to be reserved to the crown, in the general mention which is made of all burthens issuing out of the things granted, the payment of this annual stipend to the vicar of *Iford* is particularly noticed. But there is no exemption from the payment of any allowance to be made to the curate. The effect therefore of the grant would be, according to the argument, to make the grantee of the rectory subject in the law to payment of the curate without giving him the power of nomination; and we should intend a reservation severing the nomination to the curacy from the fund out
of

of which the provision for the curate must come. This would be certainly contrary to good policy, and productive of mischief, by making it questionable who was to maintain the curate, and leaving the ecclesiastical court destitute of means to compel such maintenance by sequestering the profits of the living. The curate also would be left without having any resort to the person by whom he was nominated, for a provision for his subsistence. It is too much therefore to contend, as the defendant does in this case, without special words, that a reservation should be made by intendment out of the general words of the grant, when there is no part of the subject matter, nor any thing in the nature of the case which would tend to induce such an intendment, and when reason and policy are against it. If this intendment were to hold, then the question would arise which my brother *Lawrence* argued with a great deal of force, but which it is not necessary now to enter into, Whether such a reservation could be made? The usage, it is said, stands very loosely on behalf of the impropiators. But it is certainly in their favour. The first nomination of which there is an account was made by the impropiators. How the next person was appointed does not appear. The nomination of *Turner* which followed, which is the first exercise of the right of the crown, is stated to have been by lapse, from which it is to be presumed, that the crown had no original right to nominate. The next presentation of *Dickinson* in 1727 is still less in favour of the right of the crown, because it was clearly made on complete mis-information. There was no vacancy, no avoidance, and *Turner* had still the title to the living. It must have been made on a supposition either that he was dead, or that there was an avoidance by some other means. It was a presentation granted by the crown in a case which neither intitled the crown nor any one else. *Turner* appeared, and *Dickinson* gave up the church to him, and he resumed the possession. While *Turner* was so in possession, the impropiators nominated *Lonsdale*, and on a suit in the consistory court, the Bishop of *Chester* affirmed their right to nominate, and *Turner* was in consequence dispossessed, which would not have been if the right had been in the crown. All therefore that we know of the enjoyment of the right of nomination to this curacy, from the time of the grant down to the present time is, as far as it goes, in favour of the plaintiffs, and there is no instance of a clear right of nomination on the part of the

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1790. the crown. It is for these reasons we are of opinion that there ought to be

Judgment for the plaintiff.

Monday,
May 17th.

BOX v. BENNETT.

Though a writ of error may be brought on a judgment of non-suit, the court will not in any case stay proceedings, or set aside an execution for the costs on that account.

THE plaintiff was nonsuited at the trial of this cause at the last assizes for the county of *Kent*, but immediately after the taxation of costs served the defendant with the allowance of a writ of error. The defendant not regarding this, proceeded to take out a *fi. fa.* for the costs, under which the sheriff took the plaintiff's goods in execution.

A rule having been granted to shew cause why the *fi. fa.* should not be set aside and the goods restored to the plaintiff,

Bond, Serjt. shewed cause, contending that no writ of error could be brought on a judgment of non-suit, as the plaintiff was out of court, and no error could be assigned on the proceedings.

Kerby, Serjt. in support of the rule, argued that it was the constant practice to grant writs of error on judgments of non-suit, and cited *Dyer*, 32. a. 1 *Roll. Abr.* 744. *Str.* 235.

The court said, that though error might be brought on a judgment of non-suit, it did not follow that the execution ought to be set aside. And on this day, after consideration, they laid it down as a general rule, that they would in no case stay proceedings, or set aside an execution, on account of a writ of error being brought on a judgment of non-suit, which evidently must be for the purpose of delay and vexation.

Rule discharged (a).

(a) [See *Kempland v. Macaulay*, 4 Term Rep. B. R. 436. acc. & *Lewitt v. Perry*, 5 Term Rep. B. R. 669. *contrâ*: and see *Masterman v. Grant*, 5 Term Rep. B. R. 714.]

C A S E S

ARGUED AND DETERMINED

1790.

IN THE

Court of COMMON PLEAS,

IN

Trinity Term,

In the Thirtieth Year of the Reign of GEORGE III.

MILLS v. AURIOL.

Tuesday,
June 15th.

THIS was an action of covenant, for non-payment of rent payable quarterly. The covenant on which the breach was assigned, after the usual words, "*yielding and paying, &c.*" was as follows. "And the said *Peter James* (the defendant) for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree (amongst other things) to and with the said *Benjamin* (the plaintiff), his heirs and assigns, that he the said *Peter James*, his heirs, executors, administrators, or assigns, should and would, during all the rest of the said term, thereby demised, well and truly pay, or cause to be paid, unto the said *Benjamin*, his heirs and assigns, the said clear yearly rent of 110*l.*, in manner and form aforesaid, according to the true intent and meaning of the said indenture." The breach was the non-payment of 27*l.* 10*s.* for a quarter ending *December 25*, 1789.

The bankruptcy of the defendant cannot be pleaded in bar of an action of covenant for rent.

The defendant pleaded 1st. *Non est factum.* 2d. *Riens arrers.* 3d. "That after the making of the said indenture in the said declaration mentioned, and before the suing out of the original writ of the said *Benjamin* against the said *Peter James*, to wit, on the first day of *January* in the year of our Lord 1789, and from thence until the day of suing out the commission of

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“ bankruptcy hereinafter mentioned against the said *Peter James*,
 “ he the said *Peter James* was a trader within the intent and
 “ meaning of the several statutes made and then in force against
 “ bankrupts; that is to say, a merchant, dealer and chapman, to
 “ wit, at *London* aforesaid, in the parish and ward aforesaid, and
 “ during all that time used and exercised the trade and business
 “ of a merchant, in buying and selling divers silks, and other
 “ goods, wares, and merchandizes, and receiving consignments
 “ of silks, and other goods, and selling the same on commission,
 “ for his correspondents and customers, for profit and gain, and
 “ thereby sought, and endeavoured to get his living, as other
 “ persons of the same trade usually do; and the said *Peter*
 “ *James* so being such trader as aforesaid, within the intent and
 “ meaning of the said several statutes made and then in force
 “ concerning bankrupts, and so seeking his living by way of
 “ buying and selling as aforesaid, he the said *Peter James* after-
 “ wards, and before any of the rent or money in the said declara-
 “ tion mentioned, became due and payable, to wit, on the 8th day
 “ of *June*, in the year aforesaid, at *London* aforesaid, in the
 “ parish and ward aforesaid, became and was indebted to one
 “ *George Tickner Hardy* gentleman, then being a subject of this
 “ realm, in 100 l. of lawful money of *Great Britain*, for so
 “ much money, before that time, paid, laid out, and expended
 “ by the said *George Tickner Hardy*, to and for the use of the
 “ said *Peter James*, at his special instance and request; and
 “ the said *Peter James* being so indebted as aforesaid, and being
 “ a subject of this realm, and so seeking his living by way
 “ of buying and selling as aforesaid, he the said *Peter James*,
 “ afterwards, to wit, on the same day and year last aforesaid, at
 “ *London* aforesaid, in the parish and ward aforesaid, (he the
 “ said *George Tickner Hardy* so being a creditor of the said *Peter*
 “ *James*, and being then wholly unsatisfied his debt,) manifestly
 “ became a bankrupt, within the intent and meaning of the
 “ several statutes made and then in force against bankrupts;
 “ and the said *Peter James* so being and remaining a bankrupt
 “ as aforesaid, he the said *George Tickner Hardy*, as well for
 “ himself as for all other creditors of the said *Peter James*,
 “ afterwards, to wit, on the 9th day of *June*, in the year aforesaid,
 “ at *Westminster* in the county of *Middlesex*, to wit, at
 “ *London* aforesaid, in the parish and ward aforesaid, exhibited
 “ his certain petition in writing, to the Right Honorable *Edward*
 “ *Lord Thurlow*, then Lord High Chancellor of *Great Britain*,
 “ and

“ and thereby petitioned the said Lord Chancellor, to grant to
 “ the said *George Tickner Hardy* his majesty’s commission, to be
 “ directed to such and so many persons as he should think fit
 “ to give his authority of and concerning the said bankrupt, and
 “ to all other intents and purposes, according to the provisions
 “ of the statutes made and then in force concerning bankrupts,
 “ as by the said petition remaining in the court of chancery of
 “ our lord the now king at *Westminster* aforesaid more fully
 “ appears; and the said *Peter James* further saith, that upon the
 “ said petition of the said *George Tickner Hardy* so exhibited as
 “ aforesaid, on behalf of himself and all other the then creditors
 “ of the said *Peter James*, according to the form of the statutes
 “ in such case made and provided, for giving them relief on that
 “ behalf, afterwards and before the said sum of money in the said
 “ declaration mentioned, or any part thereof became due, and before
 “ the said supposed breach of covenant, to wit, on the ninth day
 “ of *June* in the year aforesaid, at *Westminster* aforesaid, to wit,
 “ at *London* aforesaid, in the parish and ward aforesaid, a certain
 “ commission of our lord the now king, founded upon the sta-
 “ tutes made and then in force concerning bankrupts, in due
 “ form of law issued, under the great seal of *Great Britain*,
 “ bearing date the same day and year last aforesaid, directed to
 “ *Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert*
 “ *Comyn, and Charles Proby*, Esquires, and was then and there
 “ to them directed, by which said commission, our said lord
 “ the now king gave full power and authority to them the said
 “ *Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert*
 “ *Comyn, and Charles Proby*, four or three of them, to proceed,
 “ according to the said statutes, and all other statutes then in
 “ force concerning bankrupts, not only concerning the aforesaid
 “ bankrupt, his body, lands, tenements, both freehold and copy-
 “ hold, goods, debts, and all other matters whatsoever, but also
 “ concerning all other persons, who by concealment, claim, or
 “ otherwise, should offend touching or concerning the premises,
 “ or any part thereof, against the true intent and purport of the
 “ said statutes, and to do and execute all and every thing and
 “ things whatsoever, as well for and towards satisfaction and
 “ payment of the creditors of the said *Peter James*, as towards
 “ and for all other intents and purposes whatsoever, according
 “ to the order and provisions of the said statutes, as by the said
 “ commission (amongst other things) more fully appears: by

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“ virtue of which said commission, and by force of the statutes
 “ aforesaid, the said *Michael Dodson, Edward Finch Hatton, and*
 “ *Robert Comyn*, three of the commissioners named in the said
 “ commission, afterwards to wit on the eleventh day of *June*,
 “ in the year aforesaid, to wit at *London* aforesaid, in the parish
 “ and ward aforesaid, having taken upon themselves the burthen
 “ of the said commission, then and there duly adjudged and
 “ declared the said *Peter James* to have been, and become on
 “ the day of the issuing of the said commission, and then to be a
 “ bankrupt, within the true intent and meaning of the said
 “ statutes, some or one of them : And the said *Peter James* fur-
 “ ther says, that afterwards, to wit, on the 26th day of *June* in
 “ the year aforesaid, at *London* aforesaid, (the said *Peter James*
 “ then remaining and continuing a bankrupt as aforesaid,) they
 “ the said *Michael Dodson, Edward Finch Hatton, and Robert*
 “ *Comyn*, in due manner, and according to the form of the sta-
 “ tute in such case made and provided, by an indenture then
 “ and there duly made, and bearing date the same day and year
 “ last aforesaid, between the said *Michael Dodson, Edward Finch*
 “ *Hatton, and Robert Comyn*, of the one part, and *Robert Mend-*
 “ *ham, of Wallbrook, London, merchant, George Marsb of Broad-*
 “ *Street, London, silk-broker, and the said George Tickner Hardy*
 “ of the other part, then and there duly bargained, disposed,
 “ assigned, and set over, amongst other things, the said indenture
 “ of lease in the said declaration mentioned, and all the estate and in-
 “ terest of the said *Peter James*, of, in, and to the same, and of, in,
 “ and to the premises thereby demised, to the said *Robert Mendham,*
 “ *George Marsb, and George Tickner Hardy*, (the said *Robert Mend-*
 “ *ham, George Marsb, and George Tickner Hardy*, before the said
 “ assignment so made to them as aforesaid, having been duly chosen
 “ assignees of the debts, credits, goods and chattels, estate and
 “ effects of the said *Peter James* the bankrupt, according to the
 “ form of the statutes in such case made and provided,) to hold to
 “ them the said *Robert Mendham, George Marsb, and George Tickner*
 “ *Hardy*, their executors, administrators, and assigns, from thence-
 “ forth for the residue of the said demised term then to come and
 “ unexpired; by virtue of which said assignment, all the estate, interest,
 “ and term of years then to come and unexpired, property, claim, and
 “ demand, of the said *Peter James*, of and in the said indenture of lease,
 “ and of and in the premises thereby demised, then and there be-
 “ came, and was vested in the said *Robert Mendham, George Marsb,*
 “ and *George Tickner Hardy*, as such assignees, and the same from
 “ thence

“ thence hitherto hath been, and still is vested in them the said
 “ Robert Mendham, George Marsh, and George Tickner Hardy
 “ (the said commission still remaining in full force and effect, in
 “ no ways superseded, cancelled, or set aside,) and the said
 “ Robert Mendham, George Marsh, and George Tickner Hardy,
 “ then and there, to wit, on the same day and year last aforesaid,
 “ at London aforesaid, became, and were for a long time, to wit,
 “ from thence hitherto have been possessed of and in the said demise
 “ premises, with the appurtenances, and this the said Peter James
 “ is ready to verify,” &c.

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To this plea there was a general demurrer, and issue joined on the two first.

The demurrer was argued in *Easter* term last by *Bond*, Serjt. for the plaintiff, and *Le Blanc*, Serjt. for the defendant; and in this term by *Adair*, Serjt. for the plaintiff, and *Lawrence*, Serjt. for the defendant. The following was the substance of the arguments on the part of the plaintiff:

The matter disclosed in the third plea affords no answer to the demand of the plaintiff, because the covenant on which the action is brought being express, personally bound the defendant, and was not done away by the assignment under the commission of bankrupt. In leases there are two sorts of covenants, by which tenants are liable either to an action of debt or covenant; namely, express and implied covenants. In the latter, the lessee is liable to either species of action, unless there has been a complete assignment with the assent of the lessor, for by such an assignment, the right of action of the lessor is certainly divested. *Walker's case*, 3 Co. 22. a. where the lessee, having assigned his term *without* the assent of the lessor, was still holden to be subject to debt for the rent in arrear. So in *Wadham v. Marlow* (a), Lord Mansfield says that the tenant shall

(a) *Wadham v. Marlow*, B. R. Mich. 25 Geo. 3. (b) This was an action of debt for rent due on a lease which was expired. The defendant pleaded: 1. *Non est factum*. 2. As to 18 l. 5 s. one quarter's rent, that he became a bankrupt, and that the said sum of 18 l. 5 s. was due before his bankruptcy. 3. As to the residue of the sum demanded, that it became due after the bankruptcy. On the first plea issue was joined. On the second the plaintiff remitted the 18 l. 5 s. and demurred generally to the third.

It was argued in support of the demurrer, that where there is an assignment by the original lessee, if the lessor accepts rent of the assignee, the lessee is thereby discharged, it being an acceptance of the assignee as tenant. The lessor may either resort to the lessee on the privity of contract, or the assignee on the privity of estate. But having made his election against whom to proceed, he is bound by it. *Walker's case*, 3 Co. 22. *Devcreux v. Barlow*, 2 Sand. 181. The case of *Coghill v. Freelove*, 3 Mod. 325.

(b) *Cooke's Bankrupt Laws*, last edit. 511.

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shall not by his own act destroy the tenancy without the concurrence of the landlord. As the law is thus with regard to the

goes farther, as there it is said, that privity of contract with the testator is not discharged by his death. In *Contrel v. Graham, Barnes*, 69. the court interposed on behalf of the liberty of the person. That is like the case of a certificated bankrupt having by a subsequent promise made himself liable to a debt contracted before his bankruptcy, where the court have permitted a common appearance.

As to the general question, Whether the plaintiff can recover notwithstanding the assignment? the bankrupt may indeed say, that he has parted with his whole interests, and that it is hard he should be called to account on a contract previously made. But if there be any hardship it is for the legislature to interpose. Bankruptcy arises from the act of the bankrupt himself, he therefore is liable as much as any other lessee. The certificate can discharge from no debt but what is due before the bankruptcy. In *Ayles v. James*, C. B. 22 Geo. 3. which was an action of covenant, the defendant pleaded his discharge under an insolvent act, and on demurrer judgment was given for the plaintiff. It was there said, that a bankrupt is liable for covenants made before his bankruptcy; and there seems to be no reason why he should not also be liable for a debt accruing in consequence of a covenant made before it.

For the defendant it was contended, that debt was only brought on the *reddendum* of the lease. *Plowd.* 132. *Co. Litt.* 142. a. 2 *Black. C. m.* 41. It is payable out of the land not on account of the land. The moment the lessee parts with the possession the action can no longer be maintained. Notice to the lessor of the assignment by the lessee is sufficient to discharge him. There is a great difference between covenant and debt on the *reddendum*; the words "yielding and paying" create a covenant to pay, but only on condition that the lessee shall enjoy. It does not hold after eviction or loss of possession. But after loss of possession the party is still liable on an express covenant. 1 *Sid.* 447. 1 *Brownl.* 20. Rent arises on a contract executory. Suppose the bankrupt had entered into a contract to deliver goods at a future day; his assignees might have affirmed or disaffirmed the contract. All his personal engagements pass to them. If the term be of greater value than the rent, it shall be presumed that the assignees have accepted it, and the lessee shall be exonerated. The privity of contract is destroyed by the assignment. When the lessee is deprived of the land without remedy over he ceases to be liable for the rent. So it is on eviction, entry, and expulsion. *Plowd.* 71. *Noy*, 75. So if deprived by the act of God. 1 *Roll. Abr.* 236. But here the defendant is deprived by the act of law. 7 *Vin. Abr.* 84. 1 *Atk.* 67. A commission of bankruptcy is an execution in the first instance, not an act of the party. *Burr.* 2439. *Mayor v. Steward*. There is a difference between an insolvent person and a bankrupt.

Lord Mansfield: Two points were argued for the plaintiffs. 1st. If there had been no bankruptcy, but the lessee had merely assigned to another, he would still remain liable in debt, till the lessor had assented to the assignment. 2^d. Bankruptcy being an act done by the bankrupt himself, he shall remain liable like any other lessee. As to the first point, it is not necessary that there should be an actual acceptance of rent by the lessor in order to discharge the lessee from the action of debt or the *reddendum*; but any assent is sufficient. The action on the *reddendum* is founded, not merely on the terms of the demise, but on the enjoyment of the tenant. In *Warren v. Conset*, 2 *Lord Raym.* 1500. it was agreed that "levied by distress and *sic nil debet*" was a good plea to debt for rent on an indenture. What shall be deemed an enjoyment by the tenant hath been much agitated as a question of law; but he cannot destroy the tenancy without the assent of the lessor. On behalf of the defendant it was argued, that notice to the lessor is a sufficient discharge of the lessee. But in the cases in *Brownl. & Cro. Jac.* there was an express acceptance, and in *Siderfin*, though the case is short and confused, it must be so understood. In 2 *Saund.* 181. it is said he may sue either assignee or lessee. In the present case there is neither acceptance of rent nor assent; and if there were nothing but

the action of debt on an implied covenant, so also it is with respect to the action of covenant on an implied covenant, in which the general rule is, that without the assent of the lessor, the lessee shall not discharge himself from his covenant by an assignment of the term.

Thus the law stands as to implied covenants. But with regard to an express covenant, though it be true that no action of debt will lie on it against the lessee after an assignment, where the lessor has by a direct act (such as the acceptance of rent from the assignee) confirmed the assignment, *Cro. Jac.* 334., yet it is equally true, that on an express covenant, an action of covenant will lie for the lessor against the lessee, notwithstanding his acceptance of rent from the assignee. *1 Sid.* 402. *Cro. Jac.* 309. *Cro. Car.* 188. 580. *Cas. temp. Hardwicke*, 343.; and in *Cro. Jac.* 522. *1 Sid.* 447., the distinction between express and implied covenants is taken; that in an express covenant, though the lessor accept rent from the assignee, yet he may have an action of covenant against the lessee, but not in case of an implied covenant, which, it is said, is cancelled by the assignment.

The question then is, Whether in the present case, the lease and all the bankrupt's interest being vested in the assignees under the commission, he is discharged from an express covenant? Now the contrary appears from *Tharby v. Plant*, *1 Saund.* 237. The assignees of a bankrupt are like any other assignees of a lease. The assignment under the commission is no more than any other assignment with the assent of the lessor, every one having virtually given his assent to an act of parliament. *Wadhams v. Marlow*. A bankrupt though divested of his property is still liable on his express covenants.

but notice, we are all of opinion, that the lessee would be liable to the action. This brings me to the second point, on which there are only two cases; for that of *Algett v. James* does not apply. Those cases are, *Mayor v. Steward* and *Centrel v. Graham*. The first was determined on the ground that the covenant was collateral; but there is a strong though *obiter dictum* of *Tates, J.* that it would be hard to leave the lessee liable to the covenants, when the act of law had divested him of the emoluments and vested them in his creditors. In *Centrel v. Graham*, the court made a direct determination on the point. We have a fuller note of it than there is in *Barnes*. The counsel said it was merely an effort made to relieve the defendant on account of the hardship of the case. But the court would not have discharged him unless they had been satisfied that the action was not founded. This case is precisely in point, and we agree with the determination. The bankrupt's estate is vested in the assignees by act of parliament. Every man's assent shall be presumed to an act of parliament. It was agreed, that if a man be divested by act of law without his own default, he is discharged. This is as strong, because, though it was his own act originally on which the assignment was founded, yet the immediate effect produced is by the act of parliament; *et in jure, non remota sed proxima spectantur*.

Judgment for the defendant.

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The protection from debts which is given to bankrupts, is on condition of a complete obedience to the regulations of the several acts passed on the subject. It is therefore material to consider what those regulations are. By 13 *Eliz. c. 7.* Bankrupts were only discharged to the extent of the sum actually paid; and thus the law remained till the passing of 4 *Ann. c. 17.*, by which a bankrupt surrendering; and conforming with the terms prescribed, was discharged from all debts due at the time he became a bankrupt; the reasons of which provisions are stated by Lord *Hardwicke, 1 Atk. 256.* To make the remedy complete, the stat. 5 *Geo. 2. c. 30. f. 7.* gives the defence of a general plea of bankruptcy, and allows the certificate to be evidence in support of it. But the bankrupt is not discharged by these statutes from contingent debts, *Tully v. Sparkes, Lord Raym. 1546.* nor from uncertain damages, nor from debts accruing after the act of bankruptcy, though arising on a cause preceding it. The certificate is not a bar to an action, founded on an express collateral covenant, which does not run with the land. *Mayor v. Steward, 4 Burr. 2439.* In that case the bankrupt was holden liable on an express covenant, and if he be so on one sort of express covenant, why not on another? The reason why in general the creditors of a bankrupt are barred by the certificate is, that they may prove their debts under the commission. But where the creditor cannot come in under the commission, there the certificate is not a bar; and in the present case no debt could be proved under the commission. The defence here set up is founded on a mere *obiter dictum* of *Yates, J.* in *Mayor v. Steward*, where he says, that “as the acts divests
“ the bankrupt of his whole estate, and renders him absolutely
“ incapable of performing the covenant, it would be a hardship
“ upon him, if he should remain still liable to it, when he is
“ disabled by the act of parliament from performing it.” But whether there would be a hardship or not, was a matter for the consideration of the legislature. In fact the hardship would not be greater than in suing a felon after attainder and forfeiture of his lands; yet a felon in such a situation is liable to an action. *Bannister v. Trussel, Cro. Eliz. 516. Noy, 1. Owen, 69.* But in truth the hardship would be greater on landlords, if the tenant becoming a bankrupt were discharged from his express covenants. They would be liable to fraud, and might be deprived of their rent. The assignees of the bankrupt might assign the lease to an insolvent person, as in *Stra. 1221.* where

the former assignee of a term made a farther assignment to a prisoner in the *Fleet*, and by such assignment was discharged from debt for rent by the original lessor, it being holden that an assignee of a term was no longer liable than while the privity of estate continued, and he occupied the premises; which doctrine also agrees with *Walker's* case. By assignment therefore the landlord may be left without remedy unless he should resort to the antiquated process of *cessavit*, or to the assistance of two justices under stat. 11 *Geo.* 2. c. 19. s. 16. Although an action of debt on the *reddendum* of a lease is barred by a bankrupt's certificate, according to the case of *Wadham v. Marlow*, and although an action of covenant on an implied covenant is also barred by an assignment, yet it does not follow that an action of covenant on an *express* covenant is likewise barred. Though the party be exonerated in debt, he is not necessarily so in covenant. Debt lies on the *reddendum*, because a rent issues out of the land, *Plowd.* 132.; *Co. Litt.* 142. a. It is payable out of the land, and when the possession of the land is parted with, the rent, and the action of debt for the recovery of it, are gone. But an express covenant is a solemn engagement from one man to another; it neither issues out of land, nor is done away, by the loss of possession. In 1 *Salk.* 82. it is said, that the action of debt is founded on privity of estate, but covenant on privity of contract, which seems to be admitted. 7 *Vin. Abr.* 330. In the case of *Cotterell v. Hooke*, *Dougl.* 97. on covenant for non-payment of an annuity, it appeared on oyer, that there was a bond conditioned for payment of the annuity, besides the deed of covenant; it was pleaded that both were given for the same purpose, that the bond was avoided, and the defendant discharged under an insolvent act. But the court held, though the bond were forfeited before the discharge, yet the defendant might be sued afterwards on the covenant. To the same point is *Hornby v. Houlditch*, *And.* 40. the judgment of Lord Hardwicke in which case is more fully stated in 1 *Term Rep. B. R.* 93., which is directly in point to shew, that an assignment by an act of parliament does not discharge a party from an express covenant. So also in *Aylet v. James (a)*, which was an action of covenant, the defendant pleaded his discharge under an insolvent act, to which there was a demurrer, and judgment for the plaintiff, the court saying, that a bankrupt was liable on an express covenant made before the bankruptcy. The case of an

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The following were the arguments for the defendant: Admitting the authority of the cases cited on the other side, which shew that where there is a voluntary assignment by a lessee, such assignment does not excuse him from an express covenant; admitting also that the acceptance of rent by the lessor from the assignee, would not discharge the lessee from an express covenant; yet there is a clear distinction to be made between an assignment by virtue of the bankrupt laws, and a voluntary assignment by the lessee. By the former, the bankrupt is divested by act of law of all the property, out of which, and in respect of which the covenant was made. A covenant for payment of rent runs with the land; when therefore the tenant is evicted by a superior title, he is released from his covenant. When he is prevented from enjoying the land in respect of which he entered into the covenant, he is no longer liable on the covenant. Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal. *Plowd.* 71. 2 *Blac. Com.* 41.; when therefore the land is gone there is an end of the profits; and it is on account of the profits that covenants of this kind are made. When the consideration is gone the rent fails. 1 *Roll. Abr.* 454. pl. 8. Where the lessee makes a voluntary assignment of his term, he has it in his power to make what stipulations he pleases with the assignee; he may receive a consideration, may covenant for rent, for indemnity, and the like. But in case of bankruptcy, the bankrupt can make no stipulation, nor receive himself any valuable consideration. There is no analogy therefore between the assignment under a commission of bankrupt and a voluntary assignment by the lessee himself. But it is admitted on the other side, that a voluntary assignment will bar a covenant arising from the words "yielding and paying," &c. which it is said is only an implied covenant; but in *Style*, 387. & 406. those words were holden to make an express covenant. As to the hardship which is supposed to be brought upon the landlord, he may re-enter on non-payment of rent, may distrain, and resort to the land itself for satisfaction. But the lessee, if he be evicted, can have no such remedy: he might therefore suffer a greater hardship. In case of a lawful eviction the lessee is discharged from his covenants; and where he is divested of his property by an act of parliament, it operates as an eviction, and he ought in justice to be equally discharged. Though the
act

act of bankruptcy was originally his own act, yet the statute is an act of law, and according to Lord Mansfield's doctrine in *Wadham v. Marlow*, *in jure, non remota sed proxima spectantur*. The case of *Mayor v. Steward* is clearly in favour of the defendant, to shew the analogy between an eviction of the tenant by the landlord, and an eviction under an act of parliament: there also the distinction is taken between collateral covenants, and those which run with the land. As to *Bannister v. Trussel*, there was no question in that case of rent reserved on a demise, and the particular enjoyment of certain land; the point was, Whether an attainted person was freed generally from all his debts? which the court very properly held he was not. In *Wadham v. Marlow*, Lord Mansfield says "there is a strong though *obiter dictum* of " *Tates, J.* that it would be hard to leave the lessee liable to the " covenants, when the act of law has divested him of the emolu- " ments and vested them in his creditors;" and his lordship also says, that "in *Cantrel v. Graham* the court would not have dis- " charged the defendant, unless they had been satisfied that the " action was not founded." In *Ludford v. Barber*, though the point was not directly decided, yet the opinion of the court seems to be plainly intimated, that if it had been a question like the present, the rule laid down in *Wadham v. Marlow* would have guided their determination. As to *Hornby v. Houlditch*, there was no bankruptcy in that case, but a *South-Sea* director was for his misconduct deprived of his property by a bill in the nature of pains and penalties; there was no act of law operating for the benefit of an unfortunate tradesman; besides, there was a large sum reserved for the maintenance of the person who was the object of the punishment; that case therefore cannot be applied to the present. Here the lessor himself has taken away the obligation to pay the rent, by taking away the land which was the consideration of the covenant; since it was assigned by virtue of an act of parliament, to which, according to *Wadham v. Marlow*, the lessor was himself a party.

LORD LOUGHBOROUGH.—There is no degree of doubt but that the law is established, that an action of covenant may be brought on a covenant to pay rent, though the lessee be not in possession of the land, and after acceptance of rent from the assignee by the lessor. This is by privity of contract; but the distinction is clear between debt and covenant. Then when the term is taken under the assignment of commissioners of bankruptcy, the question is, Whether it is not by the act of the bank-rupt

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1790. rupt himself? It is taken from him because he has contracted debts, and instead of any single creditor suing out a *fiery facias* the common law execution, there being many creditors they join in taking out a commission of bankruptcy, which is in the nature of a statute execution. By this the property is vested in the assignees, but not so absolutely as in the vendee by a sale under a *fiery facias* made by the sheriff; because if the effects were sufficient without it, the term would remain to the lessee. Covenant then may well be brought against him. Though he is out of possession, yet he is placed in that situation by his own act. I am therefore of opinion that the demurrer ought to be over-ruled.

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GOULD, J. of the same opinion.

HEATH, J. of the same opinion.

WILSON, J.—The plea of the defendant is not supported by any adjudged case. It has never yet been decided that an action of covenant would not lie upon a covenant by a lessee which runs with the land, and which was entered into before, but broken after the bankruptcy of the covenantor. I entertained no doubt on this question except what arose from the hints thrown out by some of the judges of the court of King's Bench whenever the question has come before them, on account of the dictum of Mr. Justice Yates, in *Mayor v. Stewart*, that as the bankrupt is divested of his whole estate, and rendered incapable of performing the covenants, it would be a hardship upon him if he should still remain liable to it, when he is disabled by the act of parliament from performing it. But this opinion was clearly extra-judicial, for under the circumstances of that case, the court held the plea to be bad. In *Wadham v. Marlow*, Lord Mansfield spoke of the opinion of Mr. Justice Yates as deserving great weight though it was extra-judicial. But in that case it was not stated that the plaintiff had accepted rent from the assignee as his tenant, and it was contended that debt as well as covenant would lie against the lessee, because the lessor had done no act to shew his assent to the assignment. But the court decided, on the ground that the plaintiff had virtually assented to the assignment, every man's assent being implied to an act of parliament, and not on the ground that an action of debt would not lie. And in *Ludford v. Barber* the court gave judgment for the defendant, because the covenant declared upon had never been entered into by him with the plaintiff. Thus the question stands with respect to judicial decisions. The
several

several statutes relating to bankrupts prior to the 4 *Ann.* c. 17. left the bankrupt not only liable to all contingent debts, but to the remainder of the debts which his effects had been unable to satisfy. The hardship was the same, for the bankrupt was deprived of his all, and yet left without any protection against his creditors. The statutes previous to that time, meant to give an execution for the equal benefit of all the creditors, and if they were not fully satisfied by it, to leave them for what was unsatisfied, to every remedy against the bankrupt which they had before. Neither that statute, nor the now existing statutes upon the subject extend to this case. The 34 *Hen.* 8. c. 4. (a) directs that the Lord *Chancellor* and other great officers shall have power to sell and dispose of the lands and goods of bankrupts in as full a manner as the bankrupt himself might have done. Subsequent statutes have empowered the assignees to make the same disposition. The intent of the several statutes was, that the act of the assignees should do no more than the act of the bankrupt himself. I therefore do not see how the maxim "*In jure non remota sed proxima spectantur*" is applicable. The act of parliament only assigns the interest of the bankrupt in the land, but does not destroy the privity of contract between lessor and lessee. An action of covenant remains after the estate is gone; but generally speaking, when the land is gone, the action of debt is also gone, debt being maintainable because the land is debtor. Covenant is founded on a privity collateral to the land. A covenant of this kind is mixed; it is partly personal and partly dependant on the land; it binds both the person and the land. This brings the case within the principle of *Mayor v. Steward*.

Judgment for the plaintiff (b).

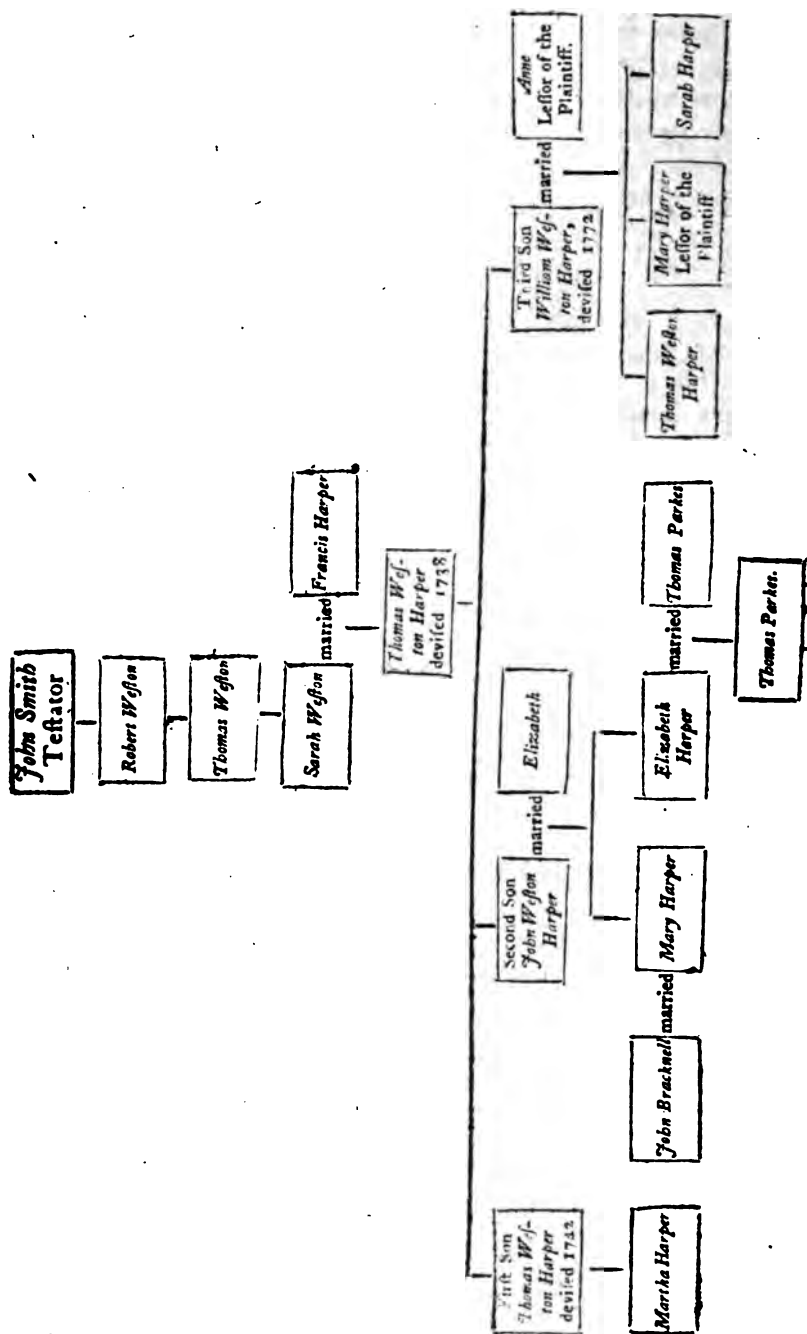
(a) *Stat.* 1.

(b) [Affirmed in K. B. see 4 *Term Rep.* B. R. 94.]

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UPON an ejectment tried at the summer assizes for the county of Warwick 1789, before Mr. Baron Hotham, a verdict was found for the lessors of the plaintiff, subject to the opinion of the court upon the following case :

John Smith of *Sherborne* in the county of *Warwick*, clerk, deceased, being seised in fee of the premises mentioned in the declaration, by his will of the 21th of *December* 1625, after reciting that on the 21st day of *December* then last he had surrendered a copyhold messuage and cottage with the appurtenances situate at *Knowle* in the said county, then in the occupation of *Robert Weylon*, being of the value of 11*l.* per annum, into the hands of the lord of the manor of *Knowle*, by two customary tenants according to the custom there, to such uses as were and should be contained in that his will, did bequeath and his will and desire was, that the inheritance of the said copyhold lands should be granted unto *Rowley Ward* Esq; *Thomas Cowper*, and *John Savage*, or to such two of them as the said *Rowley Ward* should think fit, and their heirs, and he did as much as in him was, grant and direct the said copyholds to them and their heirs, and the rents, issues, and profits thereof, to the uses, intents, and purposes thereafter expressed ; (that is to say,) from and after the decease of the said *John Smith*, his will and desire was, that *Susannah* his wife should hold and enjoy the same, and take the rents and profits thereof for her life ; and that from and after the decease of him the said *John* and *Susannah* his wife, then his will was, that the said *Rowley Ward*, *Thomas Cowper*, and *John Savage*, or such as should be new takers thereof as aforesaid, and their heirs, should for ever stand and be seised thereof, and that the rents, issues, and profits thereof, should for ever afterwards be employed and disposed of in the buying and making up ten gowns yearly, against the feast of *Christmas*, for ten poor men of the parish of *Saint Mary* in *Warwick*, such as the said *Rowley Ward* whilst he lived, and after his death such as the said *Thomas Cowper*

Monday,
June 21st.

A. devises copyhold lands to " trustees in fee (who are to be from time to time renewed), in trust that the rents and profits shall for ever afterwards be disposed of to certain charitable purposes; and directs that the rent of the said copyhold lands being 11*l.* per annum, shall never be improved or raised, but shall continue at 11*l.* per ann. and that *B.* who was the tenant of the said copyhold lands, and his children and posterity which shall succeed, shall never be put forth or from the same, but always continue the possession, paying the rent of 11*l.*" Neither *B.* nor his descendants were

ever admitted on the court rolls. If *B.* took any estate it was an equitable estate tail, the above words being clearly such as would create an estate tail. But the interest of *B.* (whatever it is) will not prevent the trustees recovering in ejectment, though the rent has been regularly paid. An equitable estate tail of a copyhold cannot be barred by the devise alone of the tenant in tail. *Qy.* Whether it would be barred by a lease of the equitable tenant in tail for a long term, i. e. 2000 years? But clearly where such lease is attended with doubtful or suspicious circumstances, it shall not prevent the trustees who have the legal estate from recovering in ejectment against the lessee. Nor is it an objection to the title of the trustees, that from the time of the original devise of *A.* to a certain period, the former trustees do not appear to have been admitted on the rolls of the manor, if there have been regular surrenders and admittances for a considerable length of time (*ex. gra.* for above 40 years) since that period; for it will be presumed, that surrenders and admittances were duly made before that period, especially as the rent has been paid during the whole time.

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and *John Savage*, and others succeeding them in the trust concerning the said copyhold lands should think fit; and his will was, that the herdsman of *Saint Mary's* for the time being should be one; also his will and desire was, that the rent of the said copyhold lands being 11 l. per annum should never be improved or raised, but should continue at 11 l. per ann. and that the said *Robert Weston* who was then tenant, and his children and posterity which should succeed, should never be put forth, or from the same, but always continue the possession of the said copyhold premises, paying the same yearly rent, duly from time to time, and to and for the purposes aforesaid, and not otherwise; and his mind and will was, that all chief rents and other payments, in respect of the said lands, should be from time to time satisfied and discharged out of the rents, issues, and profits thereof respectively; and directed that there should be from time to time, two persons trustees at least *estate*, and interested in fee of and in his aforesaid copyhold lands, to and for the purposes aforesaid, and that after the death of *Rowley Ward* Esq; and either *Cowper* or *Savage*, the bailiff of the town of *Warwick* for the time being, should within one month nominate another trustee of the aforesaid lands, with the survivor of the aforesaid *Rowley Ward*, *Thomas Cowper*, and *John Savage*.

That the said *John Smith* died without revoking his said will; that *Robert Weston* by virtue of the said will, enjoyed all the said premises during his life, and paid the said yearly rent of 11 l. unto the said trustees named in the said will, and to the persons claiming under them as trustees for the time being; and after the decease of the said *Robert Weston*, *Thomas Weston* his only child enjoyed the same during his life, and paid the said yearly rent of 11 l. unto the trustees named in the said will, and to the persons claiming under them as trustees for the time being; and after the decease of the said *Thomas*, *Sarah* the only daughter of the said *Thomas*, who intermarried with *Francis Harper*, and he the said *Francis Harper* in like manner, held and enjoyed the same during their lives, and paid the said yearly rent of 11 l. unto the said trustees named in the said will of the said *John Smith* deceased, and the persons claiming under them as trustees for the time being; and after the death of the survivor of them, the said *Francis Harper* and *Sarah* his wife, *Thomas Weston Harper* their only child held and enjoyed the same during his life, and paid the same rent of 11 l. unto the said trustees named in the said will, and the persons claiming under them as trustees for the time being;

that

that sometime in or about the year 1737, the said *Thomas Weston Harper* built a small house and shop on part of the said premises, and duly made and executed his will bearing date the 4th day of *March* 1738, and did thereby will and devise, and as far as in him lay, give and devise all and singular the said premises devised by *Smith's* will, and all his estate, right, title, and interest therein or thereto, (except the said house, shop, &c.) unto his eldest son *Thomas Weston Harper*, his heirs and assigns for ever, he and they paying out of the same the said yearly rent of 11*l.* according to the will of the said *Smith*, and thereby as far as he could, for ever disburthening the said house, shop, &c. from the payment of the same or any part thereof, to the end that that part of the premises might be held and enjoyed, free from the payment of any rent whatsoever; and as to the said house, shop, &c. being then in the tenure of the second son *John Weston Harper*, he devised the same and all his estate, right, title, and interest therein and thereto, disburthened as aforesaid, unto his said son *John Weston Harper*, his heirs and assigns for ever, he gave also several pecuniary legacies to his other children, and bequeathed the residue of his personal estate unto his son *Thomas Weston Harper*, and appointed him his executor: that the said first named *Thomas Weston Harper* died in the year 1741, leaving issue three sons, viz. *Thomas Weston Harper* his eldest son, *John Weston Harper* his second son, and *William Weston Harper* his youngest son, and without having altered his will; that upon the death of the said *Thomas Weston Harper* the father, *John Weston Harper* his second son, entered upon such part of the said premises as was devised to him by his said father's will as aforesaid, and enjoyed the same during his life, and died some time in the year 1748, leaving *Elizabeth* his widow, and two daughters *Mary* and *Elizabeth*, his only children: that after his death the said *Elizabeth* his widow entered upon and enjoyed the premises last mentioned during her life, and after her decease the said *Elizabeth* the daughter who intermarried with *Thomas Parkes*, entered upon and enjoyed the said last mentioned premises: that by an indenture bearing date the 30th day of *December* 1777; and made between *John Bracknell* and *Mary* his wife, (which *Mary* was one of the two daughters and co-heiresses of the said *John Weston Harper* the devisee in 1738.) *Thomas Parkes* the younger, the eldest son and heir of the said *Thomas Parkes*, by *Elizabeth* his wife late deceased, (who was the other daughter and co-heiress of the said *John Weston Harper*,) of the one

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1790. part, and *Edward Lockman* of the other part, for barring all *estates tail* in the premises last mentioned, and for limiting the inheritance thereof to the uses thereafter expressed, it was agreed that the said *John Bracknell*, and *Mary* his wife, *Thomas Parkes* the elder, and *Thomas Parkes* the younger, should levy a fine *sur conuzance*, &c. of all that messuage or tenement, &c. &c. at *Katharine a Barn's Heath* in the parish of *Hampton in Arden*, which premises were thentofore in the occupation of the said *John Weston Harper*, and since of *Elizabeth Weston Harper* his widow, and then of the said *Thomas Parkes* senior, and of all other the messuage, lands, tenements, and hereditaments of them the said *John Bracknell* and *Mary* his wife, *Thomas Parkes* the elder, and *Thomas Parkes* the younger, any or either of them in the parish of *Hampton in Arden* aforesaid, which were in fact those devised to *John Weston Harper*, by the said will of the first named *Thomas Weston Harper* in 1738, and part of the premises devised or mentioned to be devised in and by the will of the said *John Smith*, and described to be in the occupation of the said *Robert Weston*. The uses of which fine were declared as to one moiety of the premises, to such uses as they the said *John Bracknell* and *Mary* his wife, should during their joint lives, by any deed or writing under their hands and seals executed in the presence of two or more witnesses direct, limit, and appoint, and for want of such appointment to the use of the said *John Bracknell* and *Mary* his wife for their several lives, with remainder to the said *Mary* in fee; and as to the other moiety thereof, to the use of the said *Thomas Parkes* the elder, and *Thomas Parkes* the younger, in fee as joint-tenants.

That in *Trinity* term, 18 *Geo. 3.* a fine was duly levied with proclamation in consequence of the last mentioned deed. That by indenture of lease and release of the 18th and 19th of *May* 1778, between the said *John Bracknell* and *Mary* his wife of the one part, and the said *Thomas Parkes* the elder, and *Thomas Parkes* the younger of the other part, they the said *John Bracknell* and his wife, in consideration of 10*l.* 10*s.* to them paid by the said *Thomas Parkes* the elder, and *Thomas Parkes* the younger, did (in pursuance of the last abstracted indenture,) grant, &c. unto the said *Thomas Parkes* the elder, and *Thomas Parkes* the younger, an undivided moiety of all the last mentioned premises, to hold unto and to the use of the said *Thomas Parkes* the elder, and *Thomas Parkes* the younger, in fee as joint-tenants. The case then set forth several conveyances of the undivided moiety of *Parkes* the elder

elder and younger, to *Davis* the defendant in fee. It then stated that the premises devised to *John Weston Harper*, by his father the first mentioned *Thomas Weston Harper* aforesaid, were wholly in the parish of *Hampton* in *Arden*, but not within the manor of *Knowle*, and were part of the premises devised or mentioned to be devised, in and by the said will of the said *John Smith*, and described to be in the occupation of the said *Robert Weston*; and that it did not appear that they were held of any other manor: that the defendant *Davis* was in possession of the said premises under the said conveyances above mentioned; and that he and those under whom he derived his title to the same by virtue of the will of the said first named *Thomas Weston Harper*, and the conveyances above mentioned, have quietly and uninterruptedly enjoyed the same, without contributing to any part of the said rent of 11 l., and without any entry or claim made by the lessors of the plaintiff, or any of them, or any person or persons under whom they or any of them, derive their, his, or her title, from the year 1741, until the present ejectment brought: that *Thomas Weston Harper*, the eldest son of the said testator, the said first named *Thomas Weston Harper*, entered upon the premises in the parish of *Hampton* in *Arden* aforesaid, devised to him by the said first named *Thomas Weston Harper* in the year 1741, which were part of the said premises devised or mentioned to be devised in and by the said will of the said *John Smith*, and described to be in the occupation of the said *Robert Weston*, and enjoyed the same during his life and died leaving a daughter *Martha* his only child, and by his will bearing date the 10th June 1742, gave to his said daughter and only child *Martha* 100 l. and several other legacies to his wife and other relations; and in case his personal estate should not be sufficient to pay his legacies, he charged the farm, land, and premises devised to him by the said first named *Thomas Weston Harper* with the payment thereof; and subject thereto he also gave, devised, and bequeathed all and singular the said premises unto his brother *William Weston Harper*, in fee, to whom he also bequeathed the residue of his personal estate, and appointed him sole executor of his will: that the said *Thomas Weston Harper* the son died soon after making his will, and upon his death *William Weston Harper* his brother and devisee, entered upon and enjoyed the premises devised to him as aforesaid during his life, and by his

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will bearing date the 19th of September 1772, devised to his son *Thomas Weston Harper* in fee, all the premises devised to him the said *William Weston Harper*, by the will of his said brother the said *Thomas Weston Harper* deceased as aforesaid; he also gave the use of a room in the dwelling-house unto his wife *Ann Weston* for her life, if she continued unmarried, and gave to his two daughters *Mary* and *Sarah* 40 l. 2-piece, &c. &c. That the said *William Weston Harper* died soon after making his will, leaving the said *Thomas Weston Harper* his eldest and only son, and two daughters *Mary* and *Sarah*, which *Sarah* was his youngest daughter, but who afterwards died. That the last named *Thomas Weston Harper* entered upon the premises devised to him by his father's will as aforesaid, and being in the possession thereof by lease and release, and a fine *sur consueance de droit, come ces*, &c. conveyed to the defendant *Lowz* in fee, four closes of land containing about thirteen acres, situate in the parish of *Hampton* in *Arden* aforesaid, part of the premises devised or mentioned to be devised in and by the will of the said *John Smith*, and described to be in the occupation of *Robert Weston*. That *Lowz* has quietly enjoyed the said premises under the said lease, release, and fine, and that no actual entry had been made by the lessors of the plaintiff, or any of them, and that the said premises and no part thereof are within the manor of *Knowle*, but are part of the lands and tenements devised or mentioned to be devised in and by the will of the said *John Smith*, and described to be in the occupation of the said *Robert Weston* in manner aforesaid, and it did not appear that they were held of any other manor. That the defendant *Joseph Powell*, who was in possession of, and claimed title to the premises after mentioned, situate in the manor of *Knowle* and parish of *Sotibull*, (and which were the remaining part of the premises devised by *Thomas Weston Harper* the testator, in 1742 to *William Weston Harper* as aforesaid, and by the same *William* devised to his son *Thomas Weston Harper*,) derived his title thereto in manner after mentioned, (that is to say,) by indenture of the 13th of April 1775, between the said *Thomas Weston Harper*, the devisee in the will of the said *William Weston Harper*, of the one part, and the said *Powell* the defendant, of the other part, whereby the said last named *Thomas Weston Harper* in consideration of the rents, &c. demised to *Powell* all the premises devised by the said will then in his occupation, consisting of a farmhouse, buildings, garden, and upwards of 30 acres of land from
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Lady-day then last, for 21 years, under the yearly rent of 30 *l.* with the usual covenants; and it was thereby agreed by the said *Thomas Weston Harper*, that his mother the said *Ann Weston* should have one room in the dwelling-house (if she thought proper to demand it) during the term, in case she so long lived, and the said *Thomas Weston Harper* also agreed during the term to attend the said *Joseph Powell* yearly to *Warwick* to see the 11 *l.* a year paid to the corporation, before the rent of 30 *l.* should be demanded. By indenture between the said *Ann Weston Harper* (the widow) and the said *Thomas Weston Harper* the son of the said *William Weston Harper* deceased, of the one part; and the said *Joseph Powell* (the defendant) of the other part; in consideration of 85 *l.* to the said *Ann Weston Harper* and *Thomas Weston Harper* paid by the said *Joseph Powell*, they the said *Ann Weston Harper* and *Thomas Weston Harper* did demise, grant, bargain, sell, and assign unto the said *Joseph Powell*, his executors, administrators and assigns, all the messuage or tenement, buildings, lands and premises, demised by the last mentioned deed, and which were then in the tenure of the said *Joseph Powell*, to hold unto the said *Joseph Powell*, his executors, administrators and assigns, from the date thereof, for the term of 2000 years, *sans waste*, charged with the payment of 11 *l.* a-year to such persons, and to and for such uses, intents and purposes, as were by the will of the said *John Smith* for that purpose mentioned and appointed, and under the rent of a pepper-corn, payable to the said *Ann Weston Harper* and *Thomas Weston Harper* at *Michaelmas* yearly, with the usual covenants; and thereby *Powell* covenanted to pay the said rent or charge of 11 *l.* a-year, pursuant to the will of the said *John Smith*, and all taxes, &c. that the consideration money in the said last mentioned indenture was duly paid: that *Robert Weston*, and those deriving title under him, were not, nor were any or either of them ever admitted tenants of the said copyhold of the said manor of *Knowle*, of or for any part of the estate and premises devised by the will of the said *John Smith*, nor ever made any surrender of any part thereof to the use of any will or other instrument. That on the 24th of *October* 1744, at a court leet and court baron held for the manor of *Knowle*, it was presented by *Charles Petit* as copyholder, and allowed by the homage, that *Henry Mander* of *Warwick*, Gent. one of the aldermen of the borough of *Warwick* aforesaid, did out of court, on the 23d day of *October* then instant, surrender by the hands of the said *Petit* his attorney,

1790. all the right, interest and estate of him the said *Henry Mander*,
 of, in and to all that messuage or tenement, &c. &c. situate in
 the said manor, near a place called *Catherine a Barne's Heath*,
 then in the tenure of — *Harper*, (which premises were for-
 merly the estate of *John Smith*, clerk, deceased, who surrendered
 the same to, for and upon the several uses and trusts in his last
 will mentioned :) to the use of *John Stanton* Esq. *John Richardson*,
Edward Croft, *John Dadley*, *Isaac Twycrofs*, *John White*, *William*
Collins, and *Nicholas Rothwell*, of the said borough, aldermen,
 (pursuant to the directions and appointment of *Robert Hands*
 Gent. mayor of the said borough,) and to their heirs and assigns,
 nevertheless, to, for, upon and under the several uses, trusts and
 limitations contained in the said will of the said *Smith*, according
 to the custom of the said manor; and to this court came the
 said *Stanton*, *Richardson*, *White*, and *Collins*, and were admitted,
 and paid 20*l.* for a fine, but *Dadley* and *Rothwell* were not
 admitted; that the admittance of *Ward* and the other trustees in
Smith's will, and those who succeeded from his death until 1744, do
 not appear by the rolls of the manor of *Knowle*; that on the 30th
January 1774, *Isaac Twycrofs*, the surviving trustee in the copy
 of the court roll of the 24th *October* 1744, surrendered out of
 court, according to the custom of the manor of *Knowle*, all the
 right, title and estate of him the said *Isaac Twycrofs*, of, in and
 to all that messuage or tenement, &c. &c. situate, lying and
 being within the said manor of *Knowle*, at or near a certain place
 called *Catherine a Barne's Heath*, theretofore in the tenure of —
Harper, his assigns or under-tenants, and then of the defendant
Joseph Powell; all which premises were formerly the estate of the
 said *John Smith*, clerk, long since deceased, who surrendered the
 same to and for, and upon several uses and trusts, in his last will
 mentioned and contained, or in whatsoever other manner the
 same premises could or might be better known or described, to
 the use of *Joseph Eberall* Esq. mayor of the borough of *Warwick*
 aforesaid, and the said *Isaac Twycrofs*, and of *George Eberall*,
John Hands, *Robert Moore*, *George Cattell*, *John Sharp*, *William*
Roe, *Francis Hiorne*, *Charles Francis Greville*, *Charles Porter*
Packwood, *John Michell*, and *Bernard Geary*, of the same borough,
 aldermen, pursuant to the directions of the said *Joseph Eberall*
 the mayor, and to their heirs and assigns, nevertheless, to, for
 and upon the several uses, trusts and limitations mentioned and
 contained in the will of the said *John Smith*; and at a court leet
 and court baron held for the said manor on the 5th of *October*
 1781, the said *John Michell* the then mayor, and *Joseph Eberall*
 and

and the other surrenderees, the aldermen above mentioned, were admitted by *Thomas Greenway*, a person appointed by their letter of attorney for that purpose: that *Iaac Twycrofs*, *George Eberall*, *John Hands*, and *William Roe*, are since dead: that the lessors of the plaintiff, (except *Ann Weston* and *Mary Weston Harper*) are the survivors of the said trustees who were admitted in 1731. That the said rent of 11 *l. per annum* was regularly paid by the family of *Weston* unto the trustees for the time being, claiming under the said will of the said *John Smith* deceased, until the conveyance made by the said last named *Thomas Weston Harper* to the defendant *Powell* above mentioned, who hath since regularly paid the same down to *Michaelmas* 1787, unto the said trustees for the time being, claiming under the said will of the said *John Smith*, and hath since duly tendered the same to the said *John Sharp*, one of the said trustees, to *Michaelmas* last: that the defendant *John Lowe* has never contributed to the payment of the said rent, or any part thereof. That on the 31st of *March* 1788, notices were given to the defendant *Powell*, and to the respective tenants of the premises claiming under the defendants *Lowe* and *Davis*, signed by all the trustees aforesaid, except the said *John Michell*, on behalf of themselves and him the said *John Michell*, to quit the premises in the respective occupations of such tenants, and which are expressed in the several notices to be situate in the manor of *Knowle*, at *Michaelmas* then next following, old stile, being the end of the year, and the time when the said annual rent of 11 *l.* became due: that *Ann Weston*, one of the lessors of the plaintiff, is the widow of the said *William Weston Harper*, that *Mary Weston Harper*, another of the lessors of the plaintiff, is the sister and heir at law to the last named *Thomas Weston Harper*, and of the said *Robert Weston*, according to the custom of the said manor of *Knowle*, which is Borough English, but not being descended from the eldest son of her grandfather *Thomas Weston Harper*, she is not the heir of the said *Robert Weston*, according to the common law of descents; that by the custom of the said manor, lands and tenements may be intailed, and the youngest son of the person last seised of any copyhold estates therein, whether in fee simple or tail, is the customary heir, and if no son, the youngest daughter is the customary heir, and that the same custom extends to collateral heirs; and by the custom of the said manor estates are passed from one to another by *surrender*

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1790. *and admittance, by will and surrender to the use of it, or by*
 descent; and by *no other means whatsoever*; and estates tail of
 lands or tenements are barred by *surrender and admittance, and*
 by *no other means whatsoever*.

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This was argued in *Easter* term last by *Bond*, Serjt. for the lessors of the plaintiff, and *Le Blanc*, Serjt. for the defendants; and in this term by *Hill*, Serjt. for the lessors of the plaintiff, and *Adair*, Serjt. for the defendants. On both arguments it was admitted that there could be no doubt as to the freehold, which clearly passed by the fine. The counsel therefore confined themselves to the question, Whether the lessors of the plaintiff were intitled to recover the copyhold lands in the possession of the defendant *Powell*? The arguments on that point were to the following effect:

On the true construction of the will of *John Smith*, it seems clear that he devised a legal estate in fee in the copyhold lands to the trustees, and perhaps an equitable estate tail to *Robert Weston*, on condition that he and his descendants should pay the annual rent of 11 l. The words "children and posterity" are sufficient to create an estate tail. In 6 Co. 17. b. it is laid down that "if A. devise his lands to B. and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail;" now "children and posterity" are like "children and issues" and it is not stated that *Robert Weston* had any children born at the time of the devise. To the same point are 1 *Andersf.* 43. *Dougl.* 321. & (a) 431. in which cases the word "children" is holden to be a word of limitation, but here the expression is, "children and posterity," which makes the present case stronger than those. The intention indeed of *John Smith* the testator, seems to have been to create a perpetuity, as he says, that the *Weston* family "should never be put forth, but always continue" in possession of the said copyhold premises. But this was contrary to the rules of law. It is clear also that a proviso or condition inconsistent with the grant or devise of an estate is void. *Cro. Eliz.* 34. But here there is a demise of a fee-simple, with a direction not to raise the rent; but that part is void, being repugnant to the estate given. It can amount to be nothing more than a recommendation. 2 *Vern.* 596. 746. But it was necessary that the legal estate should be in the trustees, to enable them to perform the trusts of the will. They were to dispose of the rents and profits, to pay all chief rents, &c. and were to be

(a) *East* ed.

estate and interested in *fee* of the copyhold lands. If the *Westons* therefore took any estate in the copyhold lands, it must have been an equitable estate tail. That being the case, the estate tail could not be barred without the proper method being used to bar it, namely, a surrender, which does not appear, and then the lessor of the plaintiff *Mary Weston Harper* the heir in tail is intitled to recover. An equitable estate-tail of a freehold is hardly barrable by deed alone according to the opinion of the Chancellor in 1 *P. Wms.* 91. & *Harvey v. Parker*, 10 *Vin. Abr.* 266. pl. 6. which was afterwards affirmed in the House of Lords (a). And the same rule holds with respect to the copyholds. Neither will equity *assist* the conveyance of a copyhold without a surrender. 1 *P. Wms.* 354. But inasmuch as it is not perfectly clear what estate the *Weston* family took, and as it is beyond dispute that the trustees in the will of *Smith* took a legal estate in fee, their title in ejectment shall not be defeated by setting up the estate of *cestui que trust*, according to the doctrine laid down by Lord *Mansfield*, *Dougl.* 721. & 777. (b) To the same effect also is 1 *Brown Rep. Chanc.* 75. *Shapland v. Smith*. The lessors of the plaintiff in the first demise are likewise trustees for the benefit of a charity. They were to dispose of the rents in buying and making up ten gowns for ten poor men. Now it is clear law, that if the trustee of a charity surrenders or releases the lands, the surrenderee or releasee takes them subject to the original trust. The object of the charity must be fulfilled, and probably the court of Chancery would interfere in this case to increase the rent, for the benefit of the charity. 8 *Co.* 130. b. *Case of Thetford School*, 2 *Vern.* 397. 412. 596. 4 *Vin. Abr.* 496. The lessors of the plaintiff in the first demise, therefore, having the legal estate, are intitled to recover in the ejectment. And though the trustees under the will of *Smith*, do not appear to have been admitted as tenants of the copyhold before the year 1744, yet the rent was regularly paid by the *Westons* from the death of *Smith*. It is then fairly to be presumed that the surrenders and admittances were duly made; or at least it shall not be allowed to the defendant to deny the title of the plaintiffs on that account. In stating a title at a great distance of time, it is not necessary to produce every mesne assignment which has taken place. It is enough to shew the beginning of the title, and a reasonable length of enjoyment under it. The

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(a) As appears from the printed state of the case in the House of Lords.

(b) Last ed. *Doe v. Pitt*, & *Goodright v. Wells*.

defendant

1790. defendant therefore cannot object to the apparent chasm in the plaintiff's title, from the circumstance of there being no admissions of trustees under the will of *Smith*, entered on the rolls of the manor, previous to the year 1744.

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On behalf of the defendant it was argued, that on the fair construction of the will of *Smith*, the *Weslons* took an equitable estate in fee, subject to a rent-charge of 11*l. per annum*, for the benefit of the charity, in which the trustees had a legal interest. The words of the devise are full large enough to give an estate in fee; they direct that the rent should never be improved or raised, but continue at 11*l. per annum*, and that *Robert Weslon and his children and posterity which should succeed, should never be put forth or from the same*, but always continue the possession of the said copyhold premises. Now though the word *children* alone gives an estate tail, according to the cases cited on behalf of the plaintiff, yet here words of perpetuity are superadded. In 3 *Bulst.* 195. it was decided that a devise to *A. and B.* and that they and their successors should pay a certain yearly rent to a corporation, gave them a fee-simple. So also are 1 *Roll. Rep.* 399. 1 *Roll. Abr.* 835. l. 15. *Benloe*, 11. 2 *Freeman*, 268. 1 *Salk.* 685. If then *Thomas Weslon Harper* had an estate in fee, the question is at an end, proper conveyances having been executed to pass an estate in fee. With respect to the argument that the trustees may support an ejectment against the *cestui que trust*, it is to be observed that they are only intitled to a rent-charge of 11*l. per annum*; as long as that is paid they have no right of entry, and consequently no right to bring an ejectment: and the case states that the rent has been regularly paid to the year 1787 and since tendered. The trustees are not the landlords, the *Weslon* family are not their tenants; they had no right to give notice to quit: the rent was not paid for the occupation of the estate, but merely charged upon it. The cases cited from *Douglas* are not applicable, as there is no question here of doubtful equity between the trustee and *cestui que trust*, nor any thing to give the trustees a right to enter. The true construction of the will of *Smith* is, that the *Weslons* had an equitable estate in fee charged with the rent to the trustees. But supposing *Thomas Weslon Harper* took an estate-tail, as is contended on the other side, it was barred by the devise to his brother, in 1741. Not being tenant on the rolls of the manor, he could not surrender. He therefore took the most effectual means in his power to bar the entail, namely, by devise. So it has been holden, that the
mortgagor

mortgagor of a copyhold out of possession who could not surrender might devise the equity of the redemption. 3 *P. Wms.* 360. *King v. King* (a). So in 2 *Vezey*, 204. *Carr v. Singer*, it was decided that an entail in a copyhold might be barred by a surrender to the use of the will of the tenant in tail. Or, if the devise in 1741 was not sufficient to bar the entail, the deed of the last named *Thomas Weston Harper* was fully adequate to that effect. The principle of all the authorities on this point is, that to avoid a perpetuity, the best means in the power of the tenant in tail shall be used to bar the entail. If he is in possession, and his name is on the court rolls, he may do it by surrender to the use of his will, where there is no other customary method. If he is not in possession, and only intitled to an equity of redemption, he may do it by devise alone. So in the present case, the best means were used, which the tenant in tail had in his power to use.

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Cur. vult advis.

Lord LOUGHBOROUGH, after stating the case at length, proceeded thus: On this case it is clear that the verdict must be entered for the defendants *Lowe* and *Davis*, as to the premises in their respective occupations; first, because no title is shewn in any of the lessors of the plaintiff to the freehold lands; 2dly, because the fine in one case, and the length of adverse possession in the other, would bar an ejectment.

With regard to the copyhold lands, the first question is, Whether the lessors of the plaintiff in the first demise have shewn a title? It is fairly objected, that they do not derive a title by distinct surrenders from the persons named in the will of *Smith*. But they shew a title by surrender from a surviving trustee in 1744. It may then be presumed that antecedent to that surrender the estate had been duly conveyed, and it is not competent to the defendant *Powell*, who has constantly paid the rent of 11 *l.* to the trustees, to object to their title to receive it; and they could have no other title but as under the appointment of that will. The next objection is, that they are mere trustees with respect to the estate, and shall not recover the possession from the *cestui que trust*, while the rent of 11 *l.* is duly paid; on which the following points arise: 1st, Whether any and what estate is given by the will of *Smith* to *Robert Weston*? 2d, In whom the right of *Robert Weston* is now vested? 3d, Whether

(a) On this point see the authorities referred to in a note subjoined to *King v. King*, in the excellent edition of *Peere Williams* by Mr. Cox.

this

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this is a case in which a court of law can stop the effect of a legal title to obtain possession? The will of *Smith*, with respect to *Robert Weston*, is argued to import a mere recommendation of him and his family to be continued tenants; and it is said that a direction not to raise the rent would be void, as repugnant to the estate given; to support which position two cases from 2 *Vern.* 596. & 746. were cited. But those cases are not applicable. In the one the trustees of an estate given to a charity had thought fit to impose such a condition; in the other the Chancellor had established it on a proposal for the benefit of the trust estate. In both the act was done without due authority. But a testator in giving his estate may impose any terms consistent with the rules of law, and it can only be a question on the intention, when bequests seem to encounter each other. In the present case the devisees take no benefit, they are mere trustees. The object of the charity is limited, and the sum defined. The direction to continue the possession of *Weston* and his children and posterity paying that sum, is as positive as the direction to lay out the 11 l. and to distribute the gowns bought with it to ten poor men. The trustees are as much bound to support one bequest as the other. But although it is clear that the *Weston* family are the objects of a trust in this will, it is far from being clear in what manner the bequest in their favour is to take effect. It is not a necessary conclusion that *some* estate must pass to them by the will. It must be allowed, that a condition to pay a rent for ever, will create an estate in fee, as in the case cited from 3 *Bullstr.* 194. and that "posterity" may be a word of limitation, as in the cases cited in the first argument. But all these cases are upon words annexed to an express devise of an estate. In this will there is no express devise to *Robert Weston*. It is only, that "he who was then tenant, and his children and "posterity should never be put forth, but continue the possession." The idea of the testator seems to have been a perpetual tenancy at a fixed rent. Thinking the bequest imperative to the trustees, I do not know but that trust might have been well executed by granting leases for years renewable. I am not sure that it would be a breach of trust to follow either the course of succession to personal estate, on the legal course of descent in continuing the possession to the posterity of *Robert Weston*. But supposing that the trust is executed in the trustees, and that an estate passed to *Robert Weston*, the words "to his
" children

“ children and posterity who should succeed,” must confine it to an *estate tail*. An estate to a man and his *children*, if he has none born, is an estate tail according to *Wild's case*, 6 Co. 16. b. *Posterity* goes still further. It is an exclusion of collateral heirs, and must cut off the fee-simple by necessary implication. If then any estate passed to *Robert Weston*, it was an equitable estate tail of a copyhold descendible by the custom in Borough English, and the lessor of the plaintiff *Mary Weston Harper* is heir in tail, unless it were barred. This brings it to the question, Whether the estate tail is barred? It was argued that it was barred by the will of *Thomas Weston Harper*. Now though it is true that the devise of an equity in a copyhold requires no surrender, yet that is where the testator has a devisable estate. The entail must first be barred. The party must have done some antecedent act to enable him to devise. Here no such thing was done. And the will of *Thomas Weston Harper* did not operate long: there was no length of possession against the entail on which to presume a surrender. But it is said that the entail was barred by the deed of the younger *Thomas Weston Harper*. But it would require a good deal of argument to prove that a lease made by the equitable tenant in tail of a copyhold, should be a bar of the entail. It is not clear then that the estate tail was *de facto* barred by any act of the tenant; if not, then *Mary Weston Harper* is intitled as heir in tail. But supposing it to have been barred, and that *William Weston Harper* was tenant in fee, then she is intitled as customary heir at law. Yet on that supposition is it clear that *Powell* is intitled to hold against the plaintiffs for the term of 2000 years? He takes a lease for 21 years at the yearly rent of 30*l.* A few weeks after this he has a conveyance of the same premises for 2000 years in consideration of 85*l.* But this consideration was grossly inadequate; it was not five years' purchase. It must therefore have been either a mortgage to secure the sum of 85*l.* or a purchase evidently fraudulent, and only obtained by some imposition on an ignorant man. If it were a mortgage, the mortgagee had no right of possession as long as the money was paid. If it were a fraudulent purchase, there could be no equitable title. Then the third question is, Whether there is such an equity as can obstruct the clear legal title of the plaintiffs in the first demise to obtain possession? Now the rule is, that unless in the case of a clear trust, the equitable title of *cestui que trust* shall not be set up against the legal title of the trustee; and in the present case it is not clear who is the *cestui que trust*. If the trusts are not clearly executed in

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favour

1790. favour of any one, it is fit that the trustees should be in possession; and if any remedy is required, it must be sought in another place.

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Lowz.

We are therefore of opinion that a verdict must be entered for the lessors of the plaintiff in the first demise, as to the premises in the occupation of *Powell* (a).

(a) [That in ejectment the legal title must prevail, see *Doe d. Hodsdon v. Staple*, 2 Term Rep. B. R. 684. and *Goodtitle d. Jones v. Jones*, 7 Term Rep. B. R. 47.; in which latter case the court of K. B. held, that if it appear on a special verdict in ejectment that a satisfied term is outstanding in a trustee who is not joined in bringing the ejectment, the *cessui que use* cannot recover.]

Monday,
June 21st.

GRAY v. FOWLER and others, Assignees of PURSER a Bankrupt.

A *bonâ fide* debt is not destroyed by being mingled with an usurious contract relating to it.

THIS was an issue sent from the court of Chancery, to try whether one *James Purser*, at the time he became a bankrupt, was or was not indebted to the plaintiff in any and what sum of money?

The cause came on to be tried at the sittings after *Michaelmas* term, at *Guildhall*, before Lord *Loughborough*, when the jury found, that *Purser*, at the time he became a bankrupt, was indebted to *Gray* in the sum of 597 *l.* and also in the sum of 685 *l.* for malt, subject to the opinion of the court upon the following case: The plaintiff *Gray*, a malt factor, had supplied *Purser*, who carried on the business of a brewer, with large quantities of malt, and usually drew upon him at the expiration of three months from the delivery of each parcel of malt, for the amount; and *Purser* accepted the bills. On the 28th of *January* 1787, *Purser* owed *Gray* 1125 *l.* for malt delivered and bills accepted, some of which were then due, and the remainder nearly due. *Gray* at this time demanded payment, and upon *Purser's* requesting further indulgence, and proposing to pay the principal and interest by installments, within a period of fourteen months, *Gray* insisted upon a fixed sum of 150 *l.* being added to the debt, declaring he would have nothing to do with interest, and if the proposal was refused, he would insist on immediate payment. *Purser* accordingly, on the 30th of *January*, accepted five bills of exchange of the dates and amounts following, viz. one dated 30th *January*, payable at two months for 160 *l.*, another bill of the same date for 280 *l.* at five months, another of the same date at eight months for 262 *l.* another of the same date at twelve months for 275 *l.* and another bill of the same

date at fourteen months for 298 *l.*, amounting together to 1275 *l.* 1790.
 which bills, at *Gray's* instance, were also indorsed by *Purser's* wife
 who was supposed to have a separate property. The two first of
 the bills amounting together to 440 *l.*, were afterwards paid by *Purser*
 about the time they became due; and *Purser* became
 further indebted to *Gray* for other quantities of malt sold and
 delivered in a sum of 597 *l.* after the 30th of *January*. In the
 month of *October* 1787, all dealings between them ceased, and
Gray insisting on a better security for the debt then due to him,
 agreed to accept an assignment of some leasehold premises and
 some butts of beer. The deed of assignment was executed on
 the 2d of *November*, and the sum left in blank by the attorney
 who prepared it, was filled up at the time of the execution, as
 settled between *Gray* and *Purser* themselves, with the sum of
 1416 *l.* 4*s.* 7*d.*, which was to be discharged, with interest at
 5 *l.* *per cent.* out of the sale of the things assigned. By which
 deed of assignment, *Purser* covenanted with *Gray* to pay him
 the said sum of 1416 *l.* 4*s.* 7*d.* and interest on the days therein
 specified. This sum inserted as the consideration of the deed,
 agrees with the sum which would remain due on the bills ac-
 cepted for 1275 *l.* and the further delivery of malt for 597 *l.*, after
 deducting for the bills paid 440 *l.* except what was deducted as
 the discount on the current bills not then due. Upon the sum
 contained in this assignment, *Gray* received on the 2d *February*
 1789 three months' interest then due at 5 *l.* *per cent.* as stipulated
 in the deed. In *May* 1788 a commission of bankruptcy issued
 against *Purser*, the defendants were chosen assignees, and by an
 action of trover against *Gray*, tried in the court of King's Bench,
 recovered the goods and lease comprised in the assignment of the
 2d *November* 1787, a latent act of bankruptcy having been com-
 mitted by *Purser* long before the date of the deed.

The question for the opinion of the court was, Whether the
 above sum of 1416 *l.* 4*s.* 7*d.*, or any part of it, remained legally
 due? or, Whether the whole or any part of it was any way affected
 by the usurious contract of the 30th of *January* 1787? The
 latter sum of 685 *l.* being due for goods really delivered before
 the 30th *January* 1787, if the court should be of opinion that the
 said sum of 685 *l.* remained legally due, then the verdict to be
 entered for 1282 *l.*, being the amount of the said several sums of
 597 *l.* and 685 *l.* If the court should be of opinion that the said
 sum of 685 *l.* did not remain legally due, but that the sum of 597 *l.*
 was legally due, then the verdict to be entered for 597 *l.* only. But
 if

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if the court should be of opinion that neither the said sum of 685*l* nor the said sum of 597*l*. remained legally due, then the verdict to be entered for the defendants.

This was argued in *Easter* term last, by *Bond*, Serjt. for the plaintiff, and *Runnington*, Serjt. for the defendants. And in this term by *Adair*, Serjt. for the plaintiff, and *Le Blanc*, Serjt. for the defendants.

On behalf of the plaintiff two points were made: 1. That the prior legal debt which the jury had found to be due, was not vitiated by the subsequent usurious contract for the forbearance of it; 2. That this debt was not extinguished by the deed of assignment. To establish the first point, it was said, that the statutes 12 *Car. 2. c. 13. s. 2.* and 12 *Ann. st. 2. c. 18. s. 1.* had declared that "all bonds, contracts, and assurances whatsoever, *whereupon* and *whereby* usurious interest should be taken, " &c. should be void." But these expressions could not extend to a prior *bond fide* debt, independant of any such contract or assurance. It was admitted that the five bills of exchange which covered the usurious transaction, were void; but it was urged that the plaintiff was fairly and justly intitled to the two sums of 597*l*. and 685*l*. To shew that a former legal debt was not destroyed, by a subsequent illegal agreement, these authorities were cited, *viz. Cro. Eliz. 20. 1 Mod. 69. 2 Mod. 307. 7 Mod. 119. 1 Saund. 294. Sir Thomas Raym. 197. 3 Salk. 391. 3 Keb. 142. 2 Burr. 1077. Cowp. 112.*

With regard to the second point, it was argued that the simple contract was not extinguished by the deed, which was invalidated by the recovery of the assignees in the King's Bench; that the principal being gone, the incidental covenants were likewise annihilated. *Yelv. 19. 1 Bac. Abr. 541.* So also a bond taken for a simple contract debt, after an act of bankruptcy, does not extinguish the simple contract, or prevent the creditor from coming in under the commission. *Stra. 1042. S. C. Caf. temp. Hardwicke, 267. Bull. N. P. 182.* So if an infant become indebted for necessities, and give a bond with a penalty, conditioned for the payment of the debt; the bond being void does not extinguish the simple contract, though it would be otherwise, if it were a single obligation. *Co. Lit. 172. a. and Harg. note, last edit. Cro. Eliz. 920. Bull. N. P. 182.*

On the part of the defendants, the sum of the arguments was, that at the time when the usurious contract was made, the parties stood

stood as debtor and creditor, on an account for goods sold and bills given in the course of trade. All these were annulled, and then *Gray* became a lender of the money owing to him, and *Purser* a borrower of it, as much as if the money had been paid, and lent again at an usurious interest. 1790.

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The court were all clearly of opinion, that the fair debt for the goods sold still subsisted, unimpeached by the usurious transaction, and was not a colourable pretence to cover a real loan. Accordingly, judgment was ordered to be entered for the plaintiff, as to the two sums found by the jury.

BRAITHWAITE v. COOKSEY and Another.

Tuesday,
June 22d.

REPLÉVIN for taking on the 13th of *October* 1788, the goods of the plaintiff an infant, who sued by *prochein amy*. Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it; a distress may be taken for rent due for the whole term.

Avowry and cognizance, that for six years next before and ending on 29th *September* 1788, one *William Braithwaite* deceased, in his life-time, and *Elizabeth Braithwaite* his administratrix, held and enjoyed the said places in which, &c. in manner following, that is to say, the said *William Braithwaite* for and during a part of the aforesaid time, until and at the time of his death, and the said *Elizabeth Braithwaite* as such administratrix as aforesaid, from the death of the said *William Braithwaite* for and during the residue of the term aforesaid, under and by a certain demise thereof, thentofore made, and before the said time when, &c. determined, at a certain yearly rent, to wit, the yearly rent of 65*l.* 3*s.* And the said *Elizabeth Braithwaite* administratrix as aforesaid, continued and was in the possession of the said places in which, &c. from the determination of the said demise, until and at the said time when, &c. and because a large sum, to wit, the sum of 396*l.* 18*s.* of the said yearly rent for six years of the said demise ending and ended on the said 29th day of *September* in the year of our Lord 1788, on that day and year, and also at the said time when, &c. were in arrear and unpaid to the said *Holland* (*Cooksey*) he the said *Holland* in his own right well avows, and the said *Humphry* (the other defendant) as bailiff of the said *Holland*, well acknowledges the taking of the goods and chattels in the said declaration mentioned in the said place, in which, &c. at the said time when, &c. the said time when, &c.

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being within the space of six calendar months after the determination of the aforesaid demise, and during the continuance of the said *Holland's* title and interest in and to the same demised premises with the appurtenances, and during the possession of the said *Elizabeth Braithwaite*, administratrix as aforesaid, from whom and the said *William Braithwaite*, such arrears of rent became due as aforesaid, and justly, &c. for and in the name of a distress for the said rent so due, in arrear, and unpaid as aforesaid, and which said rent still remains due and unpaid; and this, &c.; wherefore, &c.

The second avowry and cognizance stated the yearly rent to have been 42*l.* and the arrears 252*l.*; but in other respects were the same as the first.

The third stated, That for a long space of time before the said time when, &c. to wit, for the space of six years next before, and ending and ended on the said 29th day of *September*, in the said year 1788, the said *William Braithwaite* deceased, in his life-time, and the said *John* (the plaintiff) held and enjoyed the said places in which, &c. (amongst other premises) with the appurtenances, as tenants thereof to the said *Holland*, in manner following, to wit, the said *William Braithwaite* for and during a part of the time last aforesaid, until and at the time of his death, and the said *John* from the time of the death of the said *William Braithwaite* for and during the residue of the time last aforesaid, under and by virtue of a certain other demise thereof then tofore made, and before the said time when, &c. determined, at a certain yearly rent, to wit, the yearly rent of 66*l.* 3*s.* and the said *John* continued and was in the possession of the said place, in which, &c. from the determination of the said last mentioned demise, until and at the said time when, &c. and because a large sum, to wit, the sum of 256*l.* 18*s.* of the said last mentioned yearly rent, for six years of the said last mentioned demise, ending and ended on the 29th day of *September* in the said year 1788, on that day and year, and also at the said time, when, &c. were in arrear and unpaid to the said *Holland*, he the said *Holland* in his own right well avows, and the said *Humphry* as bailiff of the said *Holland*, well acknowledges the taking of the said goods and chattels in the said declaration mentioned in the said places, in which, &c. at the said time, when, &c. the said time when, &c. being within the space of six calendar months after the determination of the said last mentioned demise, and during

During the continuance of the said *Holland's* title and interest in and to the said demised premises, and during the possession of the said *John*, from whom and the said *William Braithwaite*, such arrears of rent become due as last aforesaid, and justly, &c. for and in the name of a distress for the said rent so due, in arrear and unpaid as last aforesaid, and which said rent still remains due and unpaid, &c.

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v.
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The fourth were like the third, except that the annual rent was stated to be 42*l.* and the arrears 252*l.*

To each avowry and cognizance there was a general demurrer, in support of which *Clayton*, Serjt. argued in the following manner: At common law no distress could be taken after the expiration of the term. 1 *Roll. Abr.* 672. *Co. Litt.* 47. *b.* The statute 8 *Anne c.* 14. gave a power to executors and others to distrain within six months after the determination of the term, and during the possession of the tenant. The avowant is in the nature of a plaintiff, and to intitle himself to enter must make a good title *in omnibus*. He ought to shew that the distress was taken during the possession of the tenant. Here *William Braithwaite* died before all the rent became due, for which the distress was taken. The case therefore is not within the terms of the proviso, nor within the spirit of it, as it would tend to this, that the succeeding tenant should be liable to be distrained for rent due from his predecessor, who was out of possession, and after six months had expired from the end of the term. The first and second avowries state that *Elizabeth Braithwaite* the administratrix continued in possession, and the third and fourth that the plaintiff did the same; the pleading then is bad, for the time that *William Braithwaite* was tenant. The term *quod William Braithwaite* determined by his death.

Adair, Serjt. for the defendants. The three principal statutes concerning distresses, make these avowries good. The 32 *Hen.* 8. *c.* 37. (a) enables the landlord to distrain against executors and administrators; the 8 *Anne c.* 14. (b) to distrain within six months after the end of the term; and the 11 *Geo.* 2. *c.* 19. (c) to avow generally.

The court were very clearly of this opinion, and therefore gave Judgment for the defendants (d).

(a) S. 4.

(b) S. 6 & 7.

(c) S. 22.

(d) The rule for judgment was drawn up general for the defendants, but the opinion of the court was given on the two first avowries.

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Wednesday,
June 23d.

An action on
the case on
the stat. 23
Hen. 6. c. 9.
will not lie
against a
sheriff for
refusing to
take bail on
an attach-
ment out of
chancery;
that statute
referring on-
ly to process
in courts of
common
law.

STUDD v. ACTON (a).

Middlesex, **NATHANIEL Lee Acton**, late of *Levermere*, (to wit.) in the county of *Suffolk* Esq. late sheriff of the same county, was attached to answer to *James Studd*, in a plea of trespass on the case, &c. and thereupon the said *James* by *Townley Ward* his attorney complains: For that whereas by a certain act made in the parliament of the lord *Henry* the Sixth, late king of *England*, &c. holden at *Westminster* in the county of *Middlesex*, on the 25th day of *February*, in the 23d year of his reign, it was amongst other things enacted by the authority of the said parliament, that all sheriffs should let out of prison all manner of persons by them or any of them arrested, or being in their custody, by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants should require (as by the said statute reference being thereunto had, may more fully appear). And whereas after the making and publishing of the said act, to wit, on the 16th day of *December*, in the 30th year of the reign of our present sovereign lord the king, one *John Revett*, prosecuted out of the court of our said lord the king of his chancery, the same then being at *Westminster* in the said county of *Middlesex*, a certain writ of our said lord the king of attachment, directed to the sheriff of *Suffolk*, by which said writ the same lord the king commanded the said sheriff to attach the said *James* and *Elizabeth* his wife, and one *James Reilly* and *Elizabeth Cotton*, so as to have them before the same lord the king in his court of chancery in eight days after *Saint Hilary*, wheresoever the said court should then be, there to answer to the said lord the king as well touching a certain contempt which they, as it was alleged, had committed against our said lord the king, as also such other matters as should be then and there laid to their charge; and further to perform and abide such order as our said lord the king's said court should make in that behalf; and that the same sheriff should bring that writ with him; which said writ was thus indorsed, "by the court for not answering at the suit of *John Revett* Esq. plain-

(a) As this action was rather uncommon, the declaration is stated at length.

"iff."

“ tiff.” Which said writ so indorsed, the said *John Revett* afterwards and before the return of the same, to wit, on the 26th day of *December*, in the 30th year of the reign of his present majesty at *Westminster* aforesaid, in the county of *Middlesex* aforesaid, delivered to the said *Nathaniel Lee*, then sheriff of the said county of *Suffolk*, in due form of law to be executed; by virtue of which said writ, the said *Nathaniel Lee*, so being such sheriff of the county of *Suffolk* as aforesaid, afterwards and before the return of the said writ, to wit, on the 26th day of *December* in the year last aforesaid, at *Campsey Ash* in the said county of *Suffolk*, took and arrested the said *James Studd* and *Elizabeth* his wife: and the said *James Studd* in fact says, that immediately after the taking and arresting of them the said *James* and *Elizabeth* his wife, they the said *James* and *Elizabeth* his wife, then and there tendered and offered to the said *Nathaniel Lee* so being such sheriff as aforesaid, reasonable sureties of sufficient persons, to wit, *Thomas Carthew* and *James Lynn*, then and there being sufficient persons, and having and each of them having sufficient within the county of *Suffolk* aforesaid, for the appearance of them the said *James* and *Elizabeth* his wife, according to the command of the said writ, according to the form of the said statute. Nevertheless the said *Nathaniel Lee* not regarding the said statute, but contriving and wrongfully intending unjustly to injure, aggrieve, and oppress the said *James Studd*, and to put him to great trouble and expence in this behalf, *absolutely refused to accept of any bail or sureties* for them the said *James* and *Elizabeth* his wife, and afterwards, to wit, on the same day and year last aforesaid, carried them the said *James* and *Elizabeth* his wife, to the common gaol of our said lord the king, in and for the said county of *Suffolk*, and them then and there kept and detained prisoners under the custody of the said *Nathaniel Lee*, then sheriff of the said county of *Suffolk*, for a long space of time, to wit, for the space of 10 days, *against the form of the statute in such case made and provided*; whereby the said *James Studd* was not only during all that time deprived of his liberty and hindered and prevented from transacting his lawful affairs and business, but also by reason of the said imprisonment of his said wife, lost and was deprived of the service and assistance of his said wife in his affairs and business, wherefore the said *James Studd* saith, he is injured and hath sustained damage to the value of 1000*l.* and therefore he brings suit, &c.

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To this declaration there was a general demurrer ; which was argued in *Easter* term last by *Le Blanc*, Serjt. for the defendant, and *Lawrence*, Serjt. for the plaintiff ; and in the present term by *Rooke*, Serjt. for the defendant, and *Adair*, Serjt. for the plaintiff. The following were the arguments in support of the demurrer :

The question in this case is, Whether the sheriff is bound by the stat. 23 *Hen. 6. c. 9.* to take bail on an attachment issuing out of Chancery ? It is clear that such process is not within the words of the statute, which are, " That the said sheriffs and all " other officers and ministers aforesaid, shall let out of prison all " manner of persons by them or any of them arrested, or being " in custody by force of any writ, bill or warrant, in any action " personal, or by cause of indictment of trespass, upon reasonable " sureties," &c. Now the term " action " is confined to suits in courts of common law. It is to be considered therefore, whether the meaning of this statute extends to this process of attachment out of a court of equity. At common law there was no arrest in civil actions except in cases of trespass *vi et armis*, and in suits to recover the debt of the king : but by a gradual progress it was extended to all personal actions as at the present day. The stat. 52 *Hen. 3. c. 23.* and eighteen years after, the stat. *West. 2. 13 Ed. 1. c. 11.* gave an attachment against the bodies of bailiffs, servants, chamberlains, and receivers, for arrears of accounts. The 13 *Ed. 1. st. 3.* gave the *capias fi laicus* against the consuror of a statute merchant. By 25 *Ed. 3. st. 5. c. 17.* the same process is given in debt and detainee as in account. The 27 *Ed. 3. st. 2. c. 9.* enables the mayor of the staple to arrest the consuror of a statute staple. The 19 *Hen. 7. c. 9.* allowed the same process in case as in debt or trespass. The 23 *Hen. 8. c. 14.* ordained the like process in forcible entry on 5 *Ric. 2.* as in trespass at common law, and the like in annuity and covenant as in an action of debt. And 21 *Jac. 1. c. 4.* the like process in popular actions as in trespass *vi et armis* at common law. An arrest therefore, by the process of a court of common law, is a matter of right in the plaintiff which courts of law cannot prevent, and in which, before the legislature interfered, the sheriff had no legal power to take bail. For this purpose the 23 *Hen. 6. c. 9.* 13 *Car. 2. st. 2. c. 2.* & 12 *Geo. 1. c. 29.* were passed. But an arrest in a court of equity is by no means a right which a plaintiff can claim ; it is a mere fiction invented

invented by successive Chancellors to strengthen the jurisdiction of the court. The party is taken on a supposed contempt of the court by non-appearance. But the Chancellor may issue process of contempt or not at his pleasure, may model and controul the arrest, and may direct whether any bail, or to what amount, shall be taken. The principle therefore of arrests in courts of common law and equity is totally different. If courts of law had adopted the same fiction, the statutes which extended the *capias* would have been unnecessary. The proceeding in equity is not directly for any demand either real or personal, it is not *in rem* but *in personam*. 4 *Inst.* 84. It is usually for relief where the law is harsh, as in cases of penalties; or defective, as in applications for specific performance, or for the discovery of fraud. It was originally a matter of grace and favour, and not to be demanded as a right. Incidentally indeed equity gives full relief; having once entertained jurisdiction of the cause it will not send the parties to law again. The 19 *Hen.* 7. c. 9. being the first statute which gave a power to arrest in cases where no specific demand was made, it is obvious that at the time when the statute in question, 23 *Hen.* 6. c. 9. was passed, there was no power to arrest in such cases. In this action therefore, which is to recover uncertain damages, there could have been no arrest of the person at that time. Consequently this action could not have come within the provisions of the statute, or have been in the contemplation of the Legislature. The *subpœna* in Chancery was not invented before the reign of Ric. 2. 3 *Black. Com.* 52. The attachment of contempt for disobeying it must of course be subsequent. In the reign of *Hen.* 6. great jealousies were entertained of the power of the court of Chancery. Accordingly the 15 *Hen.* 6. c. 4. reciting that divers persons had been vexed and grieved by writs of *subpœna*, directed that “no writs of *subpœna* should be from thenceforth granted until surety were found to satisfy the party so aggrieved and vexed for his damages and expences, if so be that the matter cannot be made good which is contained in the bill.” And the 31 *Hen.* 6. c. 2. which enacts that the Chancellor should issue proclamations against persons who refused to obey the king’s writ and appear before the council, or in Chancery, is particularly cautious that no pretence should on that account be made for increasing the jurisdiction of the court of Chancery in other respects; it therefore provides “That no matter determinable by the law of the kingdom, should by that act be determined in any

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" other form than according to the course of the same law in
 " the courts of the king, having the determination of the same
 " law." At different periods then in the reign of *Hen. 6.* the
 Legislature shewed plainly an intention to restrain within certain
 bounds the authority of the court of Chancery. It is hardly
 therefore to be conceived, at an intermediate time between the
 nineteenth and thirty-first, *viz.* in the twenty-third year of that
 prince, when the jealousy of the encroachments made by clerical
 Chancellors was at its height, that if the process of attachment out of
 Chancery for disobeying a *subpoena* had been known, the Legisla-
 ture would have omitted to regulate that process together with
 the *subpoena*. But if it were at that time known, it must be pre-
 sumed that it was purposely omitted in a statute which speaks of
 other kinds of attachment. If it were not known at the time
 of passing the act, it ought not to be brought within the mean-
 ing of the act by a forced construction. This is a penal statute,
 it gives treble damages and a penalty of 40*l.*, and is therefore
 to be construed strictly. Though this is not an action for the
 penalty, yet the same construction must prevail. There cannot
 be two methods of construing the same words of a statute. The
stat. 13 Car. 2. §. 2. c. 2. which is *in pari materia*, is in terms
 confined to process out of the courts of King's Bench and
 Common Pleas, and in the fourth section expressly excludes
 attachments of contempt. In personal actions at law, the object
 is to compel an appearance to answer the demand of the plaintiff
 of a specific sum which is marked on the writ. The sheriff
 knows in what sum he is to take bail; his line of conduct is
 pointed out. The plaintiff may take an assignment of the bail
 bond if good bail be not put in to the action. But in the present
 case there can be no such assignment or justification of bail, or
 any other means by which the sheriff can relieve himself from
 the consequences of his disobeying the writ. There is no deci-
 sion or authority whatever to shew that this case is within the
 statute. If such there were, it would be against the first prin-
 ciples of the law of arrests. On the contrary, in *Bland v.*
Riccard, 3 *Lea.* 208. it was determined, that a bond taken by
 a sheriff from a person arrested on an attachment out of Chan-
 cery, was void, because such person was not bailable. And in
 an anonymous case, *Stra.* 479. it is stated to have been resolved
 by all the judges, that the sheriff could not take bail on an attach-
 ment. All the cases indeed on the subject turn on the question,
 Whether

Whether the bond when taken were good or not? The expression, that the bond is *within the statute*, is equivocal. In some cases it means that the bond is good, in others, that it is bad, according as it has reference to different parts of the statute, which in one clause prohibits bonds for ease and favour, and in another requires sheriffs to let to bail upon reasonable sureties. *Com. Dig.* tit. *Bail*, (F 8.) 2 *Ventr.* 238. *Cro. Eliz.* 647. *Style*, 234. Courts of law have rightly holden in many instances, the bond to be good, as being allowable within the equity of the statute. But there is a wide difference between allowing the bond to be taken, and compelling the sheriff to take it. Though when a statute says an officer *may* do a thing, the construction is that he *must* do it, yet at common law the words *may* and *must* have a very different signification. There are many instances where officers have a discretionary power. If commissioners of rebellion take a man, they may bail him or not at their discretion. *Com. Dig.* tit. *Chanc.* (D 5.) If therefore the sheriff has it in his option to take bail or not on an attachment out of Chancery, clearly the present action cannot be maintained. But the true ground is, that if any remedy is wanting, it must be sought in Chancery, as the Chancellor issues the process to vindicate his court from contempt, it is for him to determine whether the sheriff ought to take bail. If the sheriff has acted improperly, that court will punish him. Courts of law are not to interfere with the court of Chancery. In *Bailey v. Devereux*, 1 *Vern.* 269. an injunction was granted to restrain the defendant from proceeding in an action at law against the plaintiff, for an arrest on a commission of rebellion. So also where trespass has been brought for going over the plaintiff's land, to execute process of the court of Chancery, an injunction has been granted.

On the part of the plaintiff it was argued as follows: The process of contempt being substituted by courts of equity in lieu of process of law, ought to be governed by the same rules. There is no ground for the argument, that the defect of jurisdiction in a court of equity should give it a greater power. Although the words "action personal" in a mere technical sense signify an action at law, yet in fact an attachment out of Chancery is a writ in a personal suit. The statute in question is a remedial law. It was made to protect the liberty of the subject, and therefore ought to receive a liberal construction. As to the argument, that no such action as this was ever brought, the reason is, that it has been the universal practice to take bail, which no
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sheriff ever before thought of refusing. If he *may* take bail, he *must* on every principle of sense and law; the same construction ought in reason to be put upon the words, whether they are used in a statute, or in the language of the common law. If the case in *Com. Dig.* tit. *Chanc.* (D 5.) cited from 1 *Chan. Rep.* 262. be correct, it is contrary to the law of the land, and hostile to the common liberty of the subject. Admitting the authority of (a) *Bailey v. Devereux*, and of the case where the court of Chancery granted an injunction in an action of trespass for going over the plaintiff's ground, to execute the process of the court, neither of those cases are applicable. In both, the injunction was properly granted: in the former, because it was clearly a matter for the Chancellor to determine, whether the commission of rebellion issued regularly or not; in the latter, because the court had a right to support the execution of its own process. But in the present case there is no question concerning the regularity of the process, nor any obstruction to the execution of it. The attachment has been duly executed, and the question is, Whether the sheriff can refuse to take bail after he has done his duty, and complied with the commands of the court? As to the authority of 3 *Leon*, it is probably misstated, since it is not supported by the case of *Dive v. Manningham* (b), to which it refers, but which was on a question, Whether the bond which was there taken was void by the stat. 23 *Hen.* 6.? not, Whether a bail bond could be taken? That it has been for a great length of time the practice to take bail in case of an attachment, appears from *Com. Dig.* tit. *Bail*, (F 8.) and the cases there cited, *Style*, 234. 2 *Atk.* 507. *Hinde's Chanc. Prac.* 107. And that on a refusal to take bail, the proper remedy against the sheriff is by an action on the case, and not an action of trespass, is plain from 2 *Mod.* 32. *Smith v. Hall*.

Cur. vult advis.

LORD LOUGHBOROUGH, after stating the declaration and the nature of the action, proceeded thus:—We have taken this case into full consideration, and have conferred with the other judges on the subject, and the result is, that we are all of opinion that the action as laid cannot be maintained. It being the case of process issuing out of the court of Chancery, we think that it does not come within the statute 23 *Hen.* 6. c. 9. which directs that sheriffs shall let all persons out of prison by

(a) 1 *Vern.* 269.(b) *Plowd.* 62.

them

them arrested, or being in their custody “by force of any writ, bill, or warrant in any action personal,” which words are confined to actions at law. A subsequent statute, 13 Car. 2. §. 2. c. 2. which was made on the same subject, is distinctly confined to actions in the King’s Bench and Common Pleas, and it does not appear to have been the intent of the Legislature to interfere with the process of a court of equity. It is extremely clear that the usage has been for the sheriff to take a bail bond in 40*l.* on an attachment, and it is so laid down, *Danby v. Lawson, Eq. Ca. Abr.* 351. But it does not appear that he is obliged to take it by the statute. The first process in the court of Chancery is a *subpœna*, and if the party does not appear, then an attachment of contempt issues. If on this attachment he cannot be taken, and the sheriff returns *non est inventus*, they go on to a second attachment, and if the party be not taken on that, the next process is a commission of rebellion. On this the commissioners ought in all cases immediately to bring the party up into court. There is an inaccuracy therefore of expression in *Harrison’s Chan. Prac.* (a) where it is said that the commissioners ought to take bail, and not keep the party lingering in prison in their houses. They certainly have no right to keep the person arrested in prison: their duty is to bring him up without delay to the court of Chancery. There are cases indeed where they may not take bail. But in the present case, if the sheriff has done wrong, it is for that court to interfere out of which the process came. I do not mean to say, that there are no cases of this kind, where it would be right for the sheriff to take bail; but the question for us to determine is, Whether he is bound to do it by the statute? And for the reasons I have stated, we are all of opinion that he is not bound to do it, and therefore there must be

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Judgment for the defendant.

(a) 315. Which states imperfectly the case of *Inglis v. Vaughan*, 1 *Chan. Rep.* 262.

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Wednesday,
June 23d.

HOME v. EARL CAMDEN and Others.

Prohibition to the court of Lords of the Privy Council, Commissioners of Appeals from the Admiralty in Prize Causes.

The Declaration was as follows :

During the late war with the States General, a squadron of the king's ships having a detachment of the king's troops on board, was sent to attack a settlement belonging to the enemy; and secret instructions were given by his majesty to the commanders in chief, that all the booty which should be gained by the joint operation of the army and navy, at the attack of that settlement, should be divided in two shares, between the land and sea forces. The attack was not made, but the squadron, while the troops were on board, took

as prize a ship and cargo belonging to the enemy, in an open unfortified bay, at a distance from the destined object of attack. This ship and cargo being condemned as lawful prize, the produce of it was to be distributed according to the provisions of the prize act, 21 Geo. 3. c. 15. and the subsequent proclamation. [The court of C. P. held that] under that act, a legal right was vested in the officers and crews of the squadron to their shares, on the condemnation as lawful prize. Therefore, where the court of lords commissioners of appeals from the Admiralty had issued a monition to the prize agent, to bring in the proceeds which were in his hands, a prohibition was granted to that court, because the monition was contrary to the legal vested right of the officers and crews of the squadron. [See note at the end of the case, p. 525.]

*Middlesex, } THE Right Honourable Charles Earl Camden, the
(to wit.) } Most Noble Francis Godolphin Duke of Leeds
The Right Honourable Charles Lord Hawkebury, and Sir George Yonge Bart. being commissioners of our lord the king, duly appointed for receiving, hearing, and determining of appeals from the said lord the king's courts of Admiralty, in matters of prize, and having privilege of parliament, were summoned to answer Rodham Home Esq. who in this case, sues as well for our said lord the king as for himself, of a plea, wherefore they have caused process to issue against John Pasley, in a certain business of appeal and complaint of nullity, from our said lord the king's High Court of Admiralty in England, promoted and brought by George Johnstone Esq. commander in chief of a squadron of his said majesty's ships and vessels, lately employed in an expedition against the Cape of Good Hope and its dependencies; and the several commanders, officers and marines on board of, and belonging to the said ships and vessels, composing the said squadron, as the sole captors of the ship Hoogskarpell, whereof ——— Hermeyer was master, and her cargo, against Major General William Meadows, and the officers, soldiers and others of our said lord the king's land forces, and the officers, privates and others of our said lord the king's royal artillery, and the engineers serving under the command of the said William Meadows, at the time of the capture and seizure of the said ship and goods, asserting themselves to be joint captors of the said ship and cargo, contrary to his said majesty's writ of prohibition before directed and delivered to them.*

And therefore the said Rodham, who sues as well for the said lord the king as for himself, by John Irving his attorney, com-

plains,

plains, that *whereas* all, and all manner of pleas, of and concerning the validity, explanation, interpretation, construction, or exposition of the laws and statutes of this realm, and the cognizance of such pleas, belong and appertain to the said lord the king, and his royal crown, and to the common law, and in the courts of the said lord the king of record ought and have always been accustomed to be tried and discussed, and not in any court proceeding by any law differing from the common law of this realm. And whereas the said lord the king did in the second year of his reign, by his commission under the great seal of *Great Britain*, nominate, constitute, ordain, and appoint all and every of his privy counsellors for the time being, and others therein named, or any three or more of them, to be his commissioners for receiving, hearing, and determining of appeals from the said lord the king's courts of Admiralty, in matters of prize. And whereas the said court of commissioners of appeals, proceeds by some law differing from the common law of this realm, and therefore has no power or authority to try or discuss the validity, explanation, interpretation, construction, or exposition of any act or acts of parliament, or to expound them otherwise than is warranted, and allowed by the common law aforesaid. And whereas a statute was made in the parliament of the said lord the king held at *Westminster* in the said county of *Middlesex*, in the 21st year of his reign, intituled "An act for the encouragement of seamen and " for the more speedy and effectual manning his majesty's navy." And whereas by the said statute, (reciting that his majesty by order in council dated the 20th day of *December* in the year of our Lord 1780, was pleased to order general reprisals to be granted, against the ships, goods, and subjects of the States-General of the United Provinces, and that as well all his majesty's fleets and ships as also all other ships and vessels that should be commissioned by letters of marque or general reprisals, or otherwise, by his majesty's commissioners for executing the office of Lord High Admiral of *Great Britain*, should and might lawfully seize all ships, vessels, and goods, belonging to the States General of the United Provinces, or their subjects, or others inhabiting within any of the territories of the States General of the United Provinces, and bring the same to judgment, in any of the courts of Admiralty within his majesty's dominions,) for the encouragement of the officers and seamen of his majesty's ships of war, and the officers and seamen of all other *British* ships and vessels, having commissions and

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Commissioners appointed,

have no power to construe acts of parliament contrary to the common law.
Dutch prize act recited.

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Persons who
were to have
the property
of prizes.

How the
property was
to be divided.

and letters of marque, and for inducing all *British* seamen, who might be in any foreign service, to return into this kingdom, and become serviceable to his majesty, and for the more effectual securing and extending the trade of his majesty's subjects, *it was enacted, that the flag-officers, commanders, and other officers, seamen; mariners, and soldiers, on board every ship, and vessel of war, in his majesty's pay, should have the sole interest and property of and in all and every ship, vessel, goods, and merchandizes, which they had taken since the 20th day of December, in the year of our Lord 1780, or should thereafter take, during the continuance of hostilities against the States General of the United Provinces, after the same should have been finally adjudged lawful prize to his majesty, in any of his majesty's courts of Admiralty in Great Britain, or in his majesty's plantations in America, or elsewhere, to be divided in such proportions, and after such manner as his majesty by his proclamation of the 27th day of December, in the year of our Lord 1780, might have already ordered and directed, or as his majesty, his heirs, and successors, should think fit to order and direct, by proclamation or proclamations, thereafter to be issued for those purposes. And whereas the said lord the king, did by his proclamation of the 27th day of December, in the year of our Lord 1780, among other things order and direct that the produce of all prizes, taken as aforesaid from the States General of the United Provinces, or their subjects, or any inhabiting within any of the territories of the said States General of the United Provinces, should be distributed as follows, that is to say, the whole of the neat produce being first divided into eight equal parts, " the captain or captains of any of his said ships and " vessels of war, who should be actually on board at the taking of " any prize, should have three eighth parts, but in case any such " prize should be taken by any of his majesty's ships or vessels of " war, under the command of a flag or flags, the flag-officer or " officers being actually on board, or directing and assisting in the " capture, should have one of the said three-eighth parts, the said " one-eighth part to be paid to such flag or flag-officers, in such " proportions, and subject to such regulations as were therein " after mentioned: The captains of marines, and land-forces, " sea-lieutenants, and master, on board, should have one-eighth " part, to be equally divided amongst them: The lieutenants " and quarter-masters of marines, and lieutenants, ensigns, and " quarter-masters of land forces, secretaries of admirals, or of " commodores with captains under them, boatswains, gunners, " purser,*

“ purser, carpenter, master’s-mates, chirurgeon, pilot, and chap-
 “ lain on board, should have one-eighth part to be equally divided
 “ amongst them : The midshipmen, captain’s clerk, master sail-
 “ makers, carpenter’s-mates, boatswain’s-mates, gunner’s-mates,
 “ master at arms, corporals, yeomen of the sheets, cockswains,
 “ quarter-masters, quarter-master’s-mates, chirurgeon’s-mates,
 “ yeomen of the powder-room, serjeants of marines, and land
 “ forces on board, should have one-eighth part, to be equally
 “ divided amongst them : The trumpeters, quarter-gunners,
 “ carpenter’s crew, stewards, cook, armourer, steward’s-mate,
 “ cook’s-mate, gunsmith, cooper, swabbers, ordinary trumpeters,
 “ barber, able seamen, ordinary seamen and marines, and other
 “ soldiers, and all other persons doing duty and assisting on board,
 “ should have two-eighth parts, to be equally divided amongst
 “ them.” And whereas in the month of *January*, in the year of
 our Lord 1781, *George Johnstone* Esq. since deceased, was by the
 said lord the king appointed commander in chief of a Squadron
 of the said lord the king’s ships and vessels in the pay of his said
 majesty, to be employed on an expedition against the *Cape of Good*
Hope, the same being a colony or settlement on the coast of *Africa*,
 belonging to the said States General of the United Provinces ;
 and *Major-General William Meadows* was also at the same time
 appointed commander in chief of the said lord the king’s land
 forces, to be employed on the said expedition, and the said *Rodham*
 was also appointed captain and commander of a certain ship of
 war of our said lord the king, called the *Romney*, the same being
 one of the ships of the said Squadron. And whereas *secret in-*
structions, dated at *Saint James’s* the 29th day of *January*, in the
 year of our Lord 1781, were given by the said lord the king, to
 the said *George Johnstone* and *William Meadows*, among other
 things directing, “ in order to prevent any contests or disputes, that
 “ might otherwise arise, concerning the distribution of such booty, as
 “ should be gained from the enemy, by the joint operation of his army
 “ and navy, at the attack of the *Cape of Good Hope*, that all such
 “ booty should be divided between his land and sea forces, into two
 “ shares, according to the numbers mustered in each service, that
 “ that share which should fall to the sea service, should be divided
 “ according to the regulations established in his navy, and that out of
 “ the share which should fall to his majesty’s land forces, his com-
 “ mander in chief of the said land forces should be entitled to a division
 “ equal in proportion to that share, with what should fall to the
 “ commander in chief of the sea forces, in proportion to the share

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 Command-
 ers appointed
 of a fleet and
 army against
 the *Cape of*
Good Hope.

 Plaintiff
 captain of a
 ship.

 King’s secret
 instructions
 for the dis-
 tribution of
 booty gained
 on that ex-
 pedition.

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Fleet sailed
with the
army on
board.

No attack
made on the
Cape.

In an open
bay at a
distance
from the
Cape,
a Dutch ship
taken.

Suit in the
court of
Admiralty.

" *so falling to the navy* : the remainder to be distributed among
" the officers and men in proportion to the respective pay."

And whereas the said squadron of ships and vessels, in the pay of his said majesty, whereof the said ship called the *Romney* was one, and whereof the said *Redham* was captain and commander as aforesaid, under the command of the said *George Johnstone*, having on board the said *William Meadows*, and a body of land forces of the said lord the king, *destined to land and attack the said Cape of Good Hope*, under the command of the said *William Meadows*, did afterwards in the month of *March*, in the year of our Lord 1781, sail and proceed from *England*, on the said expedition, and on the month of *July* then next following, did arrive within a certain distance of the said *Cape of Good Hope*, but the said *George Johnstone*, with the said squadron under his command, and the said *William Meadows* with the said land forces under his command, did not, nor did neither of them, at any time make any attack on the said *Cape of Good Hope*. And whereas on the 21st day of *July* in the year last aforesaid, the said squadron whereof the said ship called the *Romney* was one, and whereof the said *Reddam* was captain and commander as aforesaid, under the command of the said *George Johnstone*, having on board the said *William Meadows*, and the land forces aforesaid, did in a certain open and unfortified bay called *Saldabna Bay*, on the said coast of *Africa*, at a great distance from the said *Cape of Good Hope*, attack and seize as prize a certain ship or vessel, called the *Hoogskarpell*, of which — *Hermeyer* was master, with divers goods, wares, and merchandizes, on board the same, being the property of and belonging to the subjects of the said States General of the United Provinces. And whereas on the 17th day of *June*, in the year of our Lord 1782, *Philip Champion Crespigny* Esq. procurator-general of the said lord the king, did in the name of the said lord the king, institute a suit against the said ship and goods so taken as aforesaid, in his majesty's High Court of Admiralty of *England*, before the worshipful Sir *James Marriot* Knt. *Doctor of Laws* (Lieutenant of the High Court of Admiralty of *England* and in the same court General Official Principal, Commissary General, and Special President and Judge thereof, and also to hear and determine all and all manner of causes and complaints, as to goods and ships, seized and taken as prize, specially constituted and appointed); and by a certain allegation by him exhibited in the said suit, among other things did propound and allege, that the said ship *Hoogskarpell*, and the goods on board

the same had been taken and seized as prize by the said *George Johnstone*, commander in chief of the said Squadron, and were at the aforesaid seizure thereof, belonging to the said States General of the United Provinces, their vassals or subjects, or others inhabiting within their countries, territories, or dominions; and did thereby pray, that the said ship *Hoogskarpell* and all and singular the goods, wares, and merchandizes, seized and taken therein, might be pronounced to belong at the time of the aforesaid seizure, to the States General of the United Provinces, their vassals or subjects, or others inhabiting within their countries, territories, or dominions, and as such, or otherwise liable to confiscation and condemnation; and might be adjudged and condemned as lawful prize to our sovereign lord the king, as being taken by the said *George Johnstone*, commander in chief of the said Squadron. And whereas the said Sir *James Marriot* did afterwards, to wit, on the 4th day of *September* in the year last aforesaid, condemn the said ship *Hoogskarpell*, and the goods, wares, and merchandizes laden on board her, and therewith taken and seized, (except a packet of diamonds,) as good and lawful prize generally, reserving the question, Who were captors? and having afterwards maturely considered the matter, did by his interlocutory decree, on the 28th day of *May*, in the year of our Lord 1785, pronounce for the interest of the army, agreeable to the spirit of his majesty's instructions, and decreed the prize in question to be distributed according to the direction of the said instructions. And whereas the said *George Johnstone*, and the several commanders, officers, and mariners on board of and belonging to the said ships and vessels, composing the said Squadron, conceiving themselves to be thereby aggrieved, did duly appeal from the said decree, to the said commissioners for receiving, hearing, and determining of appeals in matters of prize. And whereas on the 30th day of *June*, in the year of our Lord 1786, the *Right Hon. Charles Earl Camden*, Lord President of the Council of the said Lord the King, *Richard Lord Viscount Howe*, and *Fletcher Lord Grantsley*, three of the said commissioners, having heard full information by counsel on both sides, did, by their interlocutory decree, reverse the decree appealed from, and pronounced the said ship *Hoogskarpell*, and her cargo, to have been taken by the conjoint operation of his majesty's ships and vessels employed on an expedition against the Cape of Good Hope, under the command of the said *George Johnstone*, and of the army under the command of the said *William Meadows* on the same expedition; and condemned

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Ship con-
demned as
lawful prize.

Question re-
served who
were captors.

Prize de-
creed to be
distributed
according to
the king's
instructions.

Appeal from
that decree.

Decree re-
versed.

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Ship and
cargo sold.

Part of the
produce dis-
tributed
among the
officers and
crews of the
ships.

Residue in
the hands of
the surviv-
ing agent.

Action at
law brought
against the
agent.

Commis-
sioners no
power to
take the
money out
of the hands
of the agent,

or compel
him to bring
in the same.

George Yonge, Bart. five of the said commissioners for receiving, hearing, and determining appeals in matters of prize; not weighing the said laws, and statutes of this realm, but contriving the said *Rodham* to aggrieve, injure, and oppress, and to take out of the hands of the said *John Pasley*, the surviving agents of the captors of the said ship and the cargo thereof, the monies arising from the sale of the said ship and the cargo there, *and thereby to prevent the said Rodham, from recovering from the said John Pasley, his damages aforesaid*; did on the 3d day of May in the year of our Lord 1788, *admonish the said John Pasley personally to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof, as might be in his hands, power, or possession, within fifteen days, contrary to the laws and statutes of this realm*: And although his majesty's writ of prohibition in this cause, to the contrary, hath been directed and delivered to the said *Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury*, and *Sir George Yonge*, on the 10th day of February in the 29th year of the reign of our lord the now king, to wit, at *Westminster* aforesaid, in the county aforesaid; nevertheless the said *Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury*, and *Sir George Yonge*, as such commissioners of our lord the king as aforesaid, after his majesty's said writ of prohibition first directed and delivered to them to the contrary thereof, to wit, on the day and year last aforesaid, at *Westminster* aforesaid, in the county aforesaid, *caused process to be issued against the said John Pasley, to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof, as might be in his hands, power, and possession, in contempt of our said lord the king, and to the damage, prejudice, and injury of the said Rodham*; and contrary to the form and effect of the said customs and statutes; wherefore the said *Rodham Home*, who sues in this behalf, as well for our sovereign lord the king, as for himself, saith that he is injured and hath sustained damage, to the amount of 40*l.*, and therefore as well for our said sovereign lord the king as for himself he brings his suit, &c.

The defendants pleaded, in the usual form, that they did not issue process against the agent, &c. and concluded to the country. But for having his majesty's writ of consultation, they demurred generally to the declaration.

This case was first argued in *Trinity* term 1788 on a suggestion for a prohibition, by *Adair* and *Lawrence*, Serjts. for

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Monition to
the agent to
bring in an
account of
the sales and
proceeds.

Prohibition
delivered to
the commis-
sioners.

Process issued
against
the agent,
&c.

1790. the plaintiff, and *Hill, Rooke, and Le Blanc*, Serjts. for the defendants; after which the court ordered the plaintiff to declare.

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DEN. On the demurrer to the declaration, the second argument was in *Trinity* term 1789, by *Le Blanc* for the defendants, and *Lawrence* for the plaintiff; the third in *Michaelmas* term following, by *Rooke* for the defendants, and *Adair* for the plaintiff; and the fourth in the present term by *Hill* for the defendants, and *Adair* for the plaintiff (a).

The substance of the three former arguments on the part of the defendants was as follows :

The ground of prohibition stated in this declaration is, that by the prize act 21 *Geo. 3. c. 15.* the produce of captures made by his majesty's ships of war, is given to the officers and crews belonging to those ships; that in the present case there has been a sentence condemning the *Hoogskarpell* as lawful prize to the king; and that after such condemnation the Lords Commissioners of Appeals had no power to award a monition, calling upon the person in whose hands the proceeds of that ship were, to bring in an account of those proceeds, and pay the money into the hands of the registrar of the court of appeals. The question therefore arising on the demurrer is, Whether under the prize act, such a legal right vested in the plaintiff, that after the sentence was pronounced, the defendants acted contrary to the common law of this country in issuing such a monition? For supposing a legal right to be vested in the captors by the prize act, yet unless the jurisdiction of the court of Appeals be also taken away, there is no ground for a prohibition.

Before the passing of any of the prize acts, the whole property of captures made from an enemy vested in the crown; and the statute in question is a declaration of the Legislature, in what manner those prizes, which the crown had before the sole power of distributing, should in future be disposed of in the particular cases mentioned by the statute, and explained by the proclamation. But this act clearly refers only to the case of a sole capture made by the king's ships, as to the right which it vests in the captors. The first and second sections are those on which the claim of the navy is founded; but in the former the sole right in all and every ship and goods taken by a king's ship is given to the officers and crews on board; and in the latter, in case of a prize taken by a ship having a letter of marque, the same right is

(a) Vide post, the fourth argument, and the reasons which induced the court to require it.
given

given to the owner of the privateer. The words of the act relating to the king's ships are, that the different persons on board shall have the "*Sole interest*," it has not therefore in contemplation, the case of a capture made by any other persons than those whom it particularly describes: and being made to limit the prerogative of the crown, (to which the right of all prizes before belonged,) the court is bound strictly to look to the act itself, to determine the cases to which that limitation extends. But in the present instance, the sentence of the court of appeal declares that it was not a sole capture by his majesty's ships of war, since it expressly states, that the prize was taken by the joint operation of the fleet and army. Yet in order to intitle the plaintiff, it must be contended that under this sentence the navy are the sole captors; otherwise they cannot come within the words of the act of parliament. It is said, they are intitled to a part: let it be shewn to what part. If they are not intitled to the whole, can this court either from the act or proclamation say that the plaintiff has a right to any particular definitive share? The proclamation to which the act refers, directs that the *whole* of the prize shall be divided into eight parts and distributed in certain shares among the officers and seamen, and other persons in different capacities on board the ship making the capture. No person therefore can claim a right to a share of any part less than the *whole*: and though marines and soldiers on board are mentioned in the proclamation, yet the term *on board* means *belonging to the ship*. *Wemyss v. Linzee*, Dougl. 324. A separate body of troops, not acting as marines, are not soldiers *on board*, within the meaning of the statute. Such then being the construction of the act and proclamation, and that court which has alone the cognizance of the question, Whether prize or no prize? having said that this was not a sole, but a joint capture, the case is wholly out of the act; and no court of law can claim a right to inquire who shall share in the prize, or what is become of the produce of it, independent of the court of Admiralty: more especially as the court of Admiralty has directed it to be placed in the hands of their registrar, for the security and benefit of those who may be intitled.

This capture therefore not being vested by the prize act, and being made by a public armament, it belongs to the king as trustee for the public, and he has a right to distribute it in what manner he thinks fit. In the antient authorities it is laid down, that what a man gains in battle from the king's enemies, is his

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1790. own. *Bro. Abr. tit. Property, pl. 38.* This law was adapted to the border wars with *Wales* and *Scotland*, as it encouraged the great landholders to collect their vassals together at their own expence, to repel the inroads of the enemy. But this was not law as to soldiers maintained at the public expence; they acted under the directions and in the name of the crown, to which all the booty which they took belonged. This was agreeable to the law of nations. *Grot. de Jure Belli & Pac. lib. 3. c. 6, f. 8. & 14.* and has been adopted by our courts of Admiralty. *Rex v. Broom, Carth. 398. 12 Mod. 134.* In the case of (a) *Brymer v. Atkins*, this court lately said, that before the sixth year of *Queen Anne*, all prizes taken in war were of right vested in the crown, and that questions concerning the property of such prizes were not the subject of discussion in courts of law. This position is a true one, and is decisive of the present case, this being a question concerning the property of a prize, and not falling within the prize act. Whether it belongs to the king or the captors, is indifferent as to the application for the prohibition; no fixed proportion being ascertained, the court of Admiralty have a right to decide on the property, and to secure it till that decision takes place. Captures are either joint or sole. Of joint captures there are three kinds: 1. By a king's ship and a privateer having letters of marque; 2. By a king's ship and a privateer having no letter of marque; 3. By a fleet and army. In the first case (b), the proportion between the king's ship and the privateer is settled by usage according to the number of persons on board: the share of the man of war belongs by the common law to the crown, and is vested by the prize acts in the man of war; that of the privateer also originally belongs to the crown, and is given to the privateer by virtue of the king's commission. In this case, the man of war is considered as the sole captor of the king's share. In the second case, the proportion is also ascertained; the king has the whole, but in two distinct capacities: that part which is taken by the ship having no letter of marque, belongs to him in his office of admiral; the other, as owner of the man of war. Two different proctors attend to make the claim, the king's proctor and the Admiralty proctor. In this case also the man of war is the sole captor of the king's share. In the third case, the whole belongs to the king; both army and navy are paid by him, he has a right to the whole, and it depends on his pleasure whether they shall have any and what proportion,

(a) *Ante, 344.*(b) *D.ugl. 311. Roberts v. Hanley.*

The prize acts were designed to encourage the navy, but not to discourage the army. The king gives up to the navy his share in the prizes which they take, that is, where they are the sole captors. But the acts do not extend to the case of a joint capture by a fleet and army. In this case nothing can vest; because it is not to be conceived, that the king could design to give away all power of rewarding his army. He gives to the navy all prizes which they take; but this cannot mean all which they together with the army take; otherwise the king's grant would be extended beyond the meaning of the words, and most strongly against himself. If the whole were vested in the squadron, the instructions for the division of the booty would be nugatory. It cannot be supposed that these instructions rested on the acquiescence of the navy, and that it was to them rather than the king that the army were indebted for a share. If the whole be not vested, neither is any part, no proportion being ascertained. Nothing is vested till the royal pleasure is known. It is like the case of a lease to commence at *Michaelmas*, for so many years as *J. S.* shall name; though the period of commencement is fixed, yet the lessee has no right of entry till the number of years is named by *J. S.*, till he has named the lease is void for uncertainty. 6 *Co.* 35. *b.* *Co. Litt.* 45. *b.* 2 *Bac. Abr.* 664. But even if the court should be of opinion that the navy have a vested right to such share as may belong to them, yet there are authorities to shew that in such case a court of common law will not prohibit the court of Admiralty from giving effect to their sentence, the subject matter being within their jurisdiction, who having cognizance of the principal, shall also have cognizance of the incident. *Turner v. Cary*, 1 *Lev.* 243. cited *Dougl.* 604. *Rex v. Broom*, *Carth.* 398. *Brown v. Franklyn*, *Cart.* 474. also cited *Dougl.* 605. *Le Caux v. Eden*. If these principles be right, the declaration contains no ground for a prohibition. It is indeed full of contradiction and fallacy. It states that the king's proctor applied to have the whole condemned, as taken by *Commodore Johnstone*; he therefore admitted the jurisdiction of the court as to the question, Who were the captors? By the sentence, the ship was condemned as lawful prize, the question as to the captors being reserved. The court afterwards pronounced for the interest of the army, agreeable to the spirit of the king's instructions, and decreed the prize to be accordingly distributed. From this there is an appeal, and the lords com-

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missioners of appeals, though they reversed the former decree, declared the prize to have been taken by the joint operation of the fleet and army. The competence of the court to make this decision cannot be doubted. It is made by those who have the exclusive jurisdiction of the questions, Whether prize or no prize? and who were the captors? and by the tribunal to which the plaintiff himself has resorted for the discussion of them; the king's proctor having prayed that the ship might be condemned as taken by the fleet. What then is the effect of this decree? directly contrary to the allegation and prayer of the proctor. It declares the prize to have been taken by the joint operation of the land and sea forces. This therefore cannot possibly be considered as a sole capture; nor under these circumstances can the prize act vest the sole interest in the navy. It is objected, that there is an averment, which the defendants might have traversed, of the prize being taken by the fleet having land forces on board. But this averment is contradicted by the sentence of the court. This sentence is conclusive. The defendants cannot traverse the averment. After the question has been solemnly determined, no other judicature can try it. The king, the army, and the commissioners of appeals are interested in such an issue; there would be no end of litigation. The averment then is fallacious and nugatory.

The declaration goes on to state, that the navy agent, pending the dispute, while the question, Who were captors? was reserved and undecided, sold the whole, and distributed a share to the navy, *i. e.* to those who claimed to be sole captors, but whose claim was undetermined, and who were afterwards decreed not to be the sole captors: also, that the residue was remaining in the hands of the agent, "and by him ought to be distributed to the captors aforesaid;" *i. e.* to those who were decreed not to be the captors. But the agent had no right to distribute any part; it being a joint capture, nothing vested. Much less had he a right to distribute the whole. It is then stated that the plaintiff had brought an action against the agent, to recover damages for his neglect in not paying the plaintiff his share. But what share? What neglect? What pretence for an action against the agent, till the balance in his hands is liquidated? A verdict in such an action could not bind the other claimants. This action is likewise stated to have been brought in *Easter* term 1788, which ended on the 5th of May; but the motion
 to

to have issued on the *3d of May* in that year; so that the action was commenced subsequent to the monition, and was brought merely as an additional argument for a prohibition. The monition requires nothing more than an account of sales, and that the residue should be paid into court. This order is to be considered both as preparatory to the execution of the decree, and as a comment upon it. It is the same monition as is usual in all prize causes where there is a dispute. The court orders the property to be brought in, to secure it for the right claimants, and for the payment of costs. If a prohibition be granted on such a monition, the prize court cannot proceed and do justice. It frequently happens that a man of war being too strong for a privateer, takes possession of a prize, denies the right of the privateer, and libels accordingly in the court of Admiralty, but it turns out that the man of war has no right; if the court could not take the produce out of the hands of the agent, the right of the privateer could not be secured: the agent as in this case, might sell and distribute, and with more reason, since were it a joint capture with a privateer, something would vest: but the share would be uncertain; and the ground of the prohibition would be, that something being vested, though it were uncertain what, therefore the agent should retain the whole. But if this were allowed the court could afford no security to the claimants. The present is a monition on an interlocutory sentence, previous to final judgment, and while the matter remains uncertain, is highly proper. If the prize court cannot call upon the agent to account, no other court can. No court of common law can, for want of parties to the suit; and it would be a singular ground for a prohibition, that it is a matter of equitable jurisdiction for the court of Chancery. It being the common practice of the court of Prize, to take the produce of sales out of the hands of the agent, even in the case of a disputed sole capture, that court must clearly have a right to do the same, in a joint capture, where nothing is vested. But if it be doubtful, whether any interest is vested or not, this court will not in a doubtful case grant a prohibition; nor will it forbid the inferior court to proceed, unless it is clear that such proceeding is contrary to law.

But supposing such a construction could be put upon the act, as to say, that the whole is given to the navy independent of the land forces, yet the act does no more than give a common law right to persons who before had no right, and therefore gives a
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court of common law only on a concurrent jurisdiction with the court of Admiralty. That court therefore being already in possession of the cause, and having given that sentence which it was alone competent to give, shall not be prevented by a court of concurrent jurisdiction, from carrying their sentence into execution.

Upon the whole therefore it has been shewn, that 1st, The act and proclamation do not extend to the present case, which by the decision of the court of Appeals, is not that of a sole capture. 2d, If it should be construed to be a sole capture, still that court having the original jurisdiction of it, and having pronounced a sentence upon it, ought to be permitted to carry that sentence into execution. 3d, If it should be holden, that a vested right is given by the act to the navy, in such share as shall belong to them, yet as the court cannot determine what that share is, it cannot determine that any particular share vests in them, and therefore cannot prohibit the lords commissioners of appeals, from directing the money to be placed in the hands of the registrar.

On behalf of the plaintiff, the arguments took the following course :

With respect to the point made by the defendants, that "as the original question, Whether prize or no prize belonged to the court of Admiralty, therefore they had a right of enforcing their sentence?" it is to be observed, that by the act in question a provision is made, that in case of captures made by the king's ships, the officers and crews shall be enabled to appoint an agent, for the sale and appraisement of the prizes: that such agent shall give notice in the Gazette, when he means to distribute the money: that he shall not pay any share to those men who have deserted: but that the shares of deserters, and also the unclaimed parts, shall be appropriated to the use of *Greenwich* hospital. Now if the court of Prize can, as a necessary consequence of the cognizance of the original question, compel the agent to bring into court the produce of the sales, the provisions of the act would be rendered totally nugatory. That court is not obliged to give notice in the Gazette, and consequently the seamen would not know to whom to apply for their prize-money. Neither is that court bound to attend to the clause in favour of *Greenwich* hospital. The monition therefore goes in direct contradiction to the act, and tends to defeat some of its most salutary provisions. Though it may be true,

that

that before any prize-acts were passed, that court had a right to inquire what became of the produce of the sales, yet it does not follow that this right now continues. The sole property of any prize taken by a privateer, having a letter of marque, is given to the owners, who have therefore a right to appoint their own agent to dispose of the ship, and the court of Prize could not in such case take it out of his hands, without some complaint being made against him. So in the present case the law having vested the property in the officers and crews of his majesty's ships, and they having placed it in the hands of the agent, the lords commissioners of appeals can have no right to take it out of his hands, who is alone to sell and distribute it. Thus much being premised, the construction of the act is to be considered.

It gives to the flag and other officers, seamen, marines, and soldiers on board every ship in his majesty's pay, the sole interest and property of every ship taken from the States General, after the same shall be condemned as lawful prize in such proportions as shall be directed by the proclamation. In order therefore for any person to intitle himself to any share of the prize, it is only necessary that he should fall within the description of the persons mentioned in the act, and that the ship taken shall be condemned as lawful prize to his majesty. On the condemnation, the right of every such person immediately attaches. In the present case, it is admitted by the pleadings, that the capture was made by a squadron of ships under the command of Commodore *Johnstone*, with the king's troops on board. The right therefore of the navy was vested by the act, and the troops are to share as persons doing duty on board, and assisting in the capture.

The facts admitted are these. A squadron with an army on board, was detached to effect one given object. That object was the reduction of the *Cape of Good Hope*. For this purpose the army was put on board, but not to perform any other service in the course of the expedition, which might be the peculiar and proper business of the ships to perform. On the arrival of the armament at the place where the land forces were designed to act distinctly from the navy, it was likely that a considerable booty would be acquired: and as in that situation those forces would be expected to take a great share in the service, it was wise and politic that some provision should be made for the distribution of the plunder. It was accordingly ordered that

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1790. there should be an equal division. But before the arrival of the expedition at the *Cape*, there were services which the fleet were very likely to perform, namely, the capturing of the ships of the enemy, with which they might fall in; but in that interval, there was no service to which the army was peculiarly destined. There was therefore no special provision made, for the probable case of a capture made between the sailing of the fleet from this country, and its arrival at the *Cape of Good Hope*: the reason of which is obvious, because it was understood by the crown that all such cases were already provided for by the prize-act. Unless the court were to suppose, that the object of the crown was to take to itself all the prizes which should be made in the course of the voyage, they cannot but believe that this omission was designedly made: the probability of the event must have suggested itself to the minds of those who planned the expedition. As therefore it appears, that the understanding of the crown was, that the prize-act would operate upon any capture made anterior to the arrival of the squadron at the *Cape*, the court will give that effect to the act and proclamation, if the words will bear such a construction. But the words are sufficiently large for this purpose. They give the prize to the officers, seamen, marines, and soldiers on board, and all other persons who shall assist in the capture. And though when the act mentions soldiers on board, it may mean, as is contended, soldiers doing duty as marines, and to give them the same advantages as marines, yet still there is a general description of persons assisting on board, under which the army might take. In the case of *Wemys v. Linzee*, the situation of Captain *Wemys* was similar to that of General *Meadows* in the present; he and his troops were considered merely as passengers, they were on the supernumerary list, and he shared in the prize only in the fifth class, as a person assisting and doing duty on board. He was not under the command of the captain of the frigate, neither was General *Meadows* under that of Commodore *Johnstone*. In the one case it was a small detachment, in the other an army. But the question does not depend on the number of soldiers. So in the case of the ship *La Charmante*, taken at *Louisburgh*, in the year 1745, the court of Appeals decreed (a), that Captain *Huston*, who had the command of a company of troops sent to assist in the reduction of the island, and was actually put on board the king's ship *Princess Mary*, at the

(a) Feb. 20, 1752, as appears from the register of the court of Appeals.

request

request of the commodore of the Squadron, and assisting on board at the time of the capture, was not intitled to share in the class of lieutenants of the ship.

But if this be not the true construction of the act, it must be on the supposition, that the sentence of the court of Appeals in some measure controuls the facts which are admitted on the pleadings, and that this court is bound only to look to the sentence. But the sentence is, that the price was taken by the *conjoint operation* of the army and navy, and it is not necessary that any thing more shall be intended, by the words *conjoint operation*, than that the capture was made by the ship with the troops on board. The court will presume, that the sentence was given upon those facts which are admitted by the pleadings to be true, (because it was in the power of the defendants, if they had thought proper, to have taken issue, and denied those facts,) unless it necessary follows, from the words of the sentence, that it is contradictory to the act.

This capture being made at sea, in an open unfortified bay, was clearly effected by the operation of the ships. There were but two ways in which the army could assist; either by remaining in the ships and acting as part of the crew, or by being landed to prevent the escape of the enemy from the prize. Now it is consistent with the facts stated, to suppose that it was a capture made while the troops were on board the ships, and then it is obviously within the prize-act; and if they were landed to prevent the crew of the enemy's ship from getting on shore, or for any such purpose, it could not be contended that, merely from that circumstance, the case was taken out of the act. If an enemy's vessel were driven on shore, and a party of seamen landed to prevent the crew from escaping and removing the cargo, could it be said that this was not a capture by persons on board the ship making the prize? In (*a*) *Lindo v. Rodney*, Lord Mansfield says, "it would be spinning very nicely to contend, if the enemy left the ship, and got a-shore with money, were followed upon land and stripped of their money, that this would not be a sea capture; the prey is, as it were killed at sea, and taken upon land." And his lordship before says, "the original cause of taking is here at sea. The force which terrified the place into a surrender, was at sea; if they had resisted, the force to subdue would have been from the sea."

(a) Dougl. 613.

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1790. So in the present case, the capturing force was unquestionably from the sea; if the men had remained on board, it would be clearly within the prize-act, and their being put out of the ships to facilitate the enterprize, (supposing that to have been the case,) could not in reason take it out of the act. The strongest point relied on by the other side is, that the act is applicable only to the case of a sole capture, the words of it being, that the takers shall have the "sole interest" in the thing taken. But this, so far from being a necessary consequence of the words, is contrary to common experience. On the construction of the prize-acts it has been often decided, that a ship which is barely in sight of another making a capture, has a right to share in the prize. If the interpretation contended for were the true one, no prize taken by a king's ship and a privateer could be condemned under the act: the first clause gives to the king's ships such prizes as they shall take; the second provides for privateers the same encouragement: but there is no clause which divides the prizes taken by both jointly: the consequence therefore would be, that such captures not being made solely by either, would not fall within the act; whereas the constant practice is to consider them as made by both, and to divide them accordingly between both. In the case of (a) *Le Cras v. Hughes*, it clearly appears that Lord Mansfield does not consider the prize-act as being confined to the case of a sole capture. In the case of the *Bienfaisant*, taken at *Louisbourg* in the year 1758, though the navy were not strictly the sole captors, yet they were decreed to have the sole right to the prize. That was an instance where there was undoubtedly a (b) conjoint operation of land force acting on shore, and not on board the ships, yet by a sentence of the Admiralty, the prize was condemned to the navy alone (c).

Cur. vult advis.

After these arguments, the case stood for judgment. But on the last day of *Hilary* term Lord LOUGHBOROUGH said, that

(a) *Park's Insurance*, 269. last edit.

(b) The account of that co-operation, as described in the dispatches sent home by the commander of the troops, was as follows:

"The admiral sent word, he intended to send in boats with 800 men, to take or destroy the *Prudente* and the *Bienfaisant* in the harbour. I ordered all the batteries at night to fire into the enemy's works, as much as possible to keep their attention to the land. The miners and workmen went on very well with their approaches to the covered way, though they had a continued and smart fire from it. We continued our fire without ceasing. The boats got to the ships at one in the morning, and took them both."

(c) *F.b.* 74, 1759.

although he had formed a decided opinion, that as the ship and cargo in question were condemned as lawful prize, the prize-act attached upon it, which was an unlimited, universal grant of the interest of the crown to the navy; and although the sentence of the court of Appeals evidently meant to assert, that by reason of the conjoint operation of the army and navy, the property of the prize vested in neither, but in the crown, (a proposition which he thought directly contrary to the act of parliament,) yet his lordship was not then quite so clear, whether, as the case stood upon the record, it appeared that the court of Appeals had exceeded their power in merely issuing a monition to the agent to bring in the proceeds, so as, in that stage of the proceedings to afford a ground for a prohibition: and also whether there being any claimants concerned in appointing the agent, a single claimant should be permitted to object to the agent giving an account of the sales, and carrying in the proceeds.

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On these two points therefore, his lordship desired to hear some further argument.

Mr. Justice WILSON said, he wished it to be considered on further argument, what the jurisdiction of the court of Admiralty was before the passing of the prize-acts. On the discovery and first settlement of *America*, commissions were granted to Sir *Walter Raleigh*, and other private persons, who were to have for their own benefit whatever they might take. In (a) *Leonard* there was a case, he observed, which arose upon one of those commissions, where two ships belonging to different private adventurers took a prize. One had taken it, and the other was in sight. It became a question before the Admiralty, Whether the latter was intitled to any part? The court of Common Pleas took jurisdiction of it in that instance, and said that by the civil law, each ship was intitled to a moiety; and a prohibition was granted, because those two parties had agreed on their return to *England*, that whatever was taken should be divided by them in a certain proportion.

Lord LOUGHBOROUGH then said, that with respect to the jurisdiction of the court of Admiralty, he conceived that antecedent to the prize-acts, the only jurisdiction which the court of Admiralty could have, was to pronounce whether the capture made were a legal capture or not, because the sole property of what was taken by the king's ships was in the crown, and therefore

(a) 2 Leon, 182 Somers v. Sir Richard Buckley.

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there could be but one person intitled to any thing taken. In the reign of *Queen Elizabeth*, and at subsequent periods, but particularly in that reign, there were several commissions given to Sir *Walter Raleigh*, Sir *Francis Drake*, the Earl of *Cumberland*, and others who undertook, at their own private expence, adventures to seek what they could get from the *Spaniards* in *America*, as appeared from the commissions in (a) *Rymer*. It might probably have been a matter for the court of Admiralty determining upon the legality of a capture, also to determine between the grantees of the crown, as to the interest which a particular ship might have in a capture made by another ship. The court of Admiralty acting under the instructions of the crown, might incidentally determine the question between the grantees of the crown. But the prize-act had introduced a new law as binding as the common law; it had vested by force of a parliamentary grant, a title to all prizes taken at sea, in the navy. No jurisdiction therefore existing in the court of Admiralty previous to the prize-act, could intitle that court (the question of prize being decided) to decide the question of property in the prize contrary to the terms of the act of parliament.

In consequence of what was thus thrown out by the court, a further argument was ordered, which came on in the present term: when

Hill, Serjt. in support of the demurrer, argued as follows: In order to intitle the plaintiff to a prohibition, it is incumbent on him to shew in his declaration, that some legal right is vested in him, either by the common or statute law of the kingdom, which has been violated by the defendants. Now no such thing appears. If the facts stated in the declaration coupled with the prize-act were a sufficient answer to the monition, it ought to have been shewn below: it ought to have been alleged to the court of Admiralty, and perhaps they might have allowed it. If they had disallowed it, or determined contrary to it, then, and not *till* then, would have been the time to have applied for a prohibition. But supposing that the whole of the facts in the declaration had been shewn for cause to the lords of appeal, against their proceeding in respect to the agent, yet still they ought to have proceeded. It is admitted on all sides, that where the court of Admiralty has jurisdiction of the principal matter, if any collateral matter arises incidental in the cause,

(a) *Rymer's Fœd.* vol. 16. p. 16. 22. &c. edit. 1715. *London*.

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Such incidental matter, (though if it had been the original cause of suit, would have been properly cognizable in the courts of *Westminster-hall*;) may be determined in the court of Admiralty; and if that court determines that incidental matter according to the common or statute law of the land, then there is no ground for a prohibition. Now the first allegation contained in the declaration is, that all and all manner of pleas, concerning the construction and exposition of the laws and statutes of this realm belong to the king's courts of common law. But this is too large a proposition; since if the construction of the common or statute law arises incidentally in a cause in the courts of Admiralty, those courts, it is admitted, have a right to make that construction. The proposition therefore ought to have been qualified accordingly. This qualification of the general allegation of law is peculiarly applicable to the present case. For it is not alleged, that the letter of attorney, by which the agent was instituted, was exhibited to the Lords of Appeal, and that they either would not admit it, or determined against it. The application now made to the court, being to restrain the proceedings against *Pasley*, on the ground that he has an authority from those who have a legal right, (for without such authority he is a mere stranger,) that authority ought to have been shewn to the Lords of Appeal; and if they had acted, with respect to that authority, contrary to the rules of the common law, (as for instance if they had required the letter of attorney to be *proved* by two witnesses,) then, and not before, there would be a sufficient reason for a prohibition. For then it would be a case, where a court of Prize had determined an incidental matter, properly of common law cognizance, against the rules of the common law. Thus in the case of *Somers v. Sir Richard Buckley* (a), it was part of the suggestion for the prohibition, that the agreement between the parties, which was the only matter cognizable at common law, had been alleged in the court of Admiralty, and there over-ruled, and on this ground the prohibition was granted. But afterwards, it being stated by the other side, that the court of Admiralty would allow that plea and try it, a conditional consultation was granted. This shews in the strongest terms, that before the superior court will grant a prohibition, it must be fully satisfied that the matter of common law cognizance (for the misconstruction of which the prohibition is prayed) has

(a) 2 Leon. 182.

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been clearly and plainly laid before the inferior court. On the same principle the case of *Shatter v. Friend* (a), was decided, where a prohibition was granted to the Ecclesiastical Court, on account of that court having refused to admit proof of the payment of a legacy by one witness. It was there objected that the motion for the prohibition came too late, being after sentence; but Lord Hale said "they could not come till they were aggrieved by *refusal of proof*, and that was not known till after sentence." This shews the necessity of the matter, on the wrong interpretation or decision of which the prohibition is to be founded, being fully and plainly exhibited to the inferior court. Till that appears, there is no ground to prohibit them. The superior court will not presume, without due information, that the inferior court will act wrong in their decision, when such matter is brought before them. This court will not prejudice the court below.

But supposing that every thing, which ought to have been shewn to the Lords of Appeal, was shewn. In that case they would have acted perfectly right in issuing a monition. If they had not issued it, they might perhaps have been liable to a *mandamus*, to compel them to execute their sentence. They were bound to require the agent for the navy to bring the money in his hands into their court, to see it distributed according to law. For a legal right was vested in the army to a share in the prize, whatever was the *quantum* of that share. Of this the court of Appeals was bound to take care. To the possession of this, the agent does not appear to have any right. The declaration in stating the appointment of *Taylor* and *Pasley* as agents, does not shew that they or either of them had a right to be possessed of the whole. The act (b) directs, that all sales, &c. of any ship and goods, &c. taken by any of his majesty's ships of war, shall be made by agents or persons, nominated and appointed in equal numbers, by the flag-officers, captains, officers, ships' companies, and "*others intitled therunto*." Those words are added to every different class of persons, to whom, in different proportions, the prize is given. But in the declaration those words are totally omitted. Now it is clear, not only from this omission, but from the whole declaration, that *Pasley* is not agent for the army as well as the navy. The contest is plainly between the navy and army, the former claiming the

(a) 1 Show. 158 & 172.

(b) 19 Geo. 3. c. 67. s. 31.

whole,

Whole, and the latter contending for a part. *Pasley* therefore not being appointed "*by the others intitled thereto*," viz. the army, can have no right to keep their share in his hands. Now the proper way of taking that share out of his hands, was by directing him to come to an account; and deposit the proceeds of the ship and cargo in the court of Appeals. If his constituents have a right only to a part, some one else must have a right to the other part, which it was the duty of the lords commissioners to protect. But an account could not be taken of a part, without an account being taken of the whole. The agent also having disposed of part of the proceeds, before the final adjudication, the navy who appointed him, have forfeited their right.

By the act, the agent is to be appointed by a majority of those intitled. But it is not stated in the declaration that *Pasley* was appointed by a majority. It cannot be intended that he was appointed by them all, as they were very numerous, and many died before the appointment. And this objection may be made, though it be on a general demurrer. For a demurrer admits nothing but what is well pleaded. The constitution of the agent goes to the very root and foundation of the title to the prohibition; but it is defectively set forth, and therefore ill pleaded. It is likewise stated that *Taylor* and *Pasley* were appointed agents, (not that *Pasley* alone was,) and that *Taylor* is dead. Now the distinction in the books is this, that where an *interest* is conveyed to two, it will survive; but where an *authority* is so conveyed, it is to be taken strictly, and will not survive. Thus if a warrant to arrest be given to two, without saying jointly and *severally*, and one dies, there is an end of it. The principle upon which an executorship survives, is that an executor has an interest. But it was long doubted whether an administration could survive. The appointment also should have been by letter of attorney according to the directions of the act. But there is no letter of attorney stated. Another objection is, that though there are many joint constituents of the agent, having a joint title in the prize, yet the action is brought by a *single captain*. It is also stated in the declaration, that part of the proceeds has been received, without saying what part. Now the plaintiff is to recover by his own strength; and he has not shewn a right, not having averred that he *had not received the whole of his share*. Though in a plea in bar, certainty to a common intent is sufficient, yet a greater certainty is required

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1790. in a count. *Co. Litt.* 305. a. This was a matter within the plaintiff's own knowledge, and is of the substance of his title. If he had made the proper averment, an issue might have been taken upon it. It has been argued on the part of the plaintiff, that the whole right was in the navy, and that the army were intitled only to a part as *cestui que trusts*, or on a *quantum meruit*. But the contray is most apparent upon the face of the declaration. Either the prize act does not attach, and then the whole is in the crown, or it does attach, and then the same proclamation which gives a legal right to the navy, gives also a legal right to the army. The prizes are to be divided among the seamen, marines, and soldiers on board. These are distinct sets of men, regulated by different laws. Ever since the restoration, there has been a standing law for the navy, so also there is a standing law for the marines; but there is no standing law for the soldiers, whose existence as an army depends upon an annual act of parliament. These different classes of men are accordingly the objects of the prize act and proclamation, in certain proportions. The same sort of right which vests in one, vests also in the others, whatever may be the *quantum* of their respective shares. The case of *Wemys v. Linzee* (a), was referred to in a former argument, but the interpretation there put upon the words "on board" that they meant "belonging to the ship" was evidently as repugnant to Lord Mansfield's own opinion, (though he felt himself bound by the decision in the case of Lord Anson and the *Centurion*,) as it was to former determinations. For in *Tr. 1 Geo. 1.* the court of King's Bench determined in the case of *Santlow v. Walker* (b), that an admiral who was appointed in England to supersede another in the command of a squadron at Jamaica, but had not arrived on that station, and so was *not actually on board* some ship composing the squadron, though he certainly belonged to it, was not intitled to a share in a prize taken in the *West Indies* by one of the ships of the squadron, while he was on his passage.

It is therefore to be hoped, that the court will in this instance put a construction on the words "on board," contrary to that in *Wemys v. Linzee*, upon the same principle on which in *Gerrforth v. Fearon* (c) they decided, that the profits of an office ought not to be separated from the execution of it. The public good equally requires, that those persons who perform military service should receive the reward of those services, as that they who execute civil offices, should receive the profits of those offices.

(a) *Dougl.* 324. 1st edit.

(b) This case Mr. Serjt. Hill read from a MS.

(c) *Ante*, 327.

The courts of Admiralty proceed by the rules of the civil law; 1790.
Hale's Hist. C. L. 31 & 32. and according to the civil law (a),
 the property of prizes taken by private persons was in the cap- HOME
 tors. So also by the antient law of *England* from the earliest Earl CAM-
 times, the prizes which were taken by private persons belonged DEN.
 to them, subject to certain deductions. This appears from the
 (b) *Black Book* of the Admiralty, from many (c) rolls of parlia-
 ment, from the Year Books, 2 Ric. 2, 3. pl. 4. & 7 Ed. 4. 14.
 1 Rol. Rep. 175. Bro. Abr. Property, pl. 38. *Clerke's Praxis*
Admiral, 174 & 175. *Harg. Tracts*, 247., and also from statute
 20 Hen. 6. c. 1. which, though made for a particular purpose,
 to provide for the case of neutral goods, or those of a friend being
 taken in the ship of an enemy, yet proves what the law was in
 general. Thus the law stood in former times, when war was
 regularly declared, and the method of carrying on hostilities by
 making reprisals was not so frequent as at later periods. By
 subsequent regulations of the Admiralty, private ships are obliged
 to take out letters of marque, or are liable to be treated as pirates,
 which is also agreeable to the *French* ordinances (d): but the pro-
 perty in what they take still remains in the captors, the several
 prize-acts having in this respect recognized the antient law.

As therefore in case of a privateer, the share of the prize which
 the crew would have, would depend upon the agreement they
 had entered into with the owners by whom they were paid, so

(a) *Ea quæ ex hostibus capiuntur, jure gentium statim nostra sunt.* Inst. lib. 2. tit. 1. §. 17.

(b) In this antient treatise, which is preserved among the other MSS. left by Lord Hale
 to the Society of Lincoln's Inn, are the following regulations:

"S'il avient desouz les gages du roy sur la mer, ou en ports, biens des ennemys estre-
 gaignes par toute la flotte ou par parcelle d'icelle, donques aura & prendra le roy de
 toutes manieres d'iceulx biens la quarte partie, et les seigneurs des nefs une autre
 quarte partie; et l'eutre moitie d'iceulx biens auront les gaigneurs d'iceulx, la quelle
 moitie doit estre entre eulx egalement parties; de la quelle moitie aura l'admiral en
 chacune nef deux shares, c'est a dire, autant comme deux mariners, s'il est present
 au temps que la prise est faite, et s'il est absent, donques il n'aura forsque de chacune
 veisel ung share: et iceulx de la Flotte, qui sont hors de veue au temps de la prise,
 n'auront nulle partie d'iceulx s'ils ne sont feygians vers la prise et dedens la veue, par
 ainsi qu'ilz soient semblables d'aider aux captours de la prise avec leur voiles, se
 mestier estoit." A. 19.

The next article contains a provision as to private ships.

"Si hors des gages du roy, aucuns biens par galioters ou autres, soient pris sur la
 mer, donques le roy ne chalengera nul droit, ne proprement aura nul part: mais
 iceulx qui gaigrez les auront, forsque l'admiral en aura deux shares." A. 20. and
 see *Clerke's Prac.* 175.

(c) Rot. Parl. 50 Ed. 3. No. 31. fev. 81. 5 Hen. 4. No. 59. 7 & 8 Hen. 4.
 No. 22. 20 Hen. 6. No. 13. fev. 30. in which last there are rules for the division of
 prizes taken by ships in the king's pay, not totally unlike those in modern proclamations.

(d) *Code des Prises*, vol. 1. p. 34. art. 7.

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in the present case, if it be not within the prize-act, both army and navy must depend on the bounty of the king, in whom the prize would be then vested, and by whom they are paid. But if it be within the act, then the army have a vested right to a share, and a prohibition ought not to be granted, unless the monition had issued against their agent as well as the navy agent.

In *Packman's case*, 6 Cq. 18. *b.* it was holden that an appeal in the ecclesiastical court suspended the former sentence, and to the same point is *Gouldsh.* 119. So it is of an appeal in a court of Admiralty. This is plain from all the proceedings in the Admiralty; and from the stile which the plaintiff himself uses in the declaration, which is, "a certain business of appeal and complaint of nullity," the decree appealed from appears to be not only reversed, but rendered a nullity *ab origine*. The former sentence therefore was annulled, and that which remains expressly pronounces the capture to have been joint, by the fleet and army. The courts of Admiralty have an undoubted right to determine who were captors. They examine as to the capture, and decide whether it be lawful prize or not, and either reserve the question, Who were captors? as in the present case, or decide that also. If they have not here determined it to be a joint capture, they have determined nothing on the subject; either way, therefore, the argument on the part of the plaintiff, that the navy were the sole captors, is ill founded. And the court of Appeals having pronounced their sentence, had clearly a right to issue process in execution of that sentence according to the old doctrine in *The King v. Broom*, and the modern authority of *Smart v. Wolff*, 3 Term Rep. B. R. 323. Then, if the Lords of Appeals had a right to issue the monition, this court have no right to prohibit them.

Adair, Serjt. for the plaintiff. Admitting many of the principles laid down in support of the demurrer, the application of them to the present case may fairly be controverted. Allowing it to be clear law, that where matter properly belonging to a court of common law, comes incidentally before a court of Admiralty, an Ecclesiastical court, or any other court proceeding by a law different from the common law, the court which has cognizance of the principal has also cognizance of the incident, provided the incident be determined according to the rules of the common law; yet it is equally clear, that if the incident be determined contrary to those rules, a prohibition ought to be granted. It remains therefore to be seen, what the incident is in this case, and whether the court of Appeals have not decided that incident

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in a manner different from the rules of the common law. The incident arises not upon the letter of attorney by which the agent was appointed, but upon the construction of the prize-act. Allowing then that the court of Appeals have a right to construe the statutes which are made for their regulation, yet if they construe those statutes wrong, there is a clear ground for a prohibition. This doctrine was fully admitted by the court in the late case of (*a*) *Brymer v. Atkins*, and is not to be disputed; *a fortiori* therefore if they act contrary to those statutes they ought to be prohibited.

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With respect to the objection, that the agent (who acted under the authority of the navy) having taken possession of the prize, and applied part of the proceeds before the final adjudication, the navy had forfeited their right, and therefore were not intitled to a prohibition; the answer is, that there has been an adjudication of lawful prize, from which adjudication there has been no appeal. The only part of the judgment of the court of Admiralty which is disputed is, that which was reserved upon that adjudication, namely, Who were the captors? The second sentence with respect to the capture, is that which the plaintiff conceives to be contrary to the act. The adjudication of prize is questioned by no one, nor has it been opposed in any stage of the business. As to the objection to the statement of the appointment of the agents, that statement is, that they were *duly* appointed, which is admitted by the demurrer. Upon looking into the clause of the act, it will appear who those "others interested therein" are, who, it is objected, are not stated to have concurred in the appointment of the agents. They are the officers, marines, and soldiers acting on board the ships, in whom an interest is unquestionably vested. And the plaintiff so far from opposing the interest of the army under the prize-act, admits that by the act they have a vested interest, but contends that they have no other interest than what is so vested. It is plain from adverting to the act and proclamation, in what capacity the officers, marines, and soldiers claim any share of a prize taken upon the High Seas. The proclamation stated in the declaration, and referred to by the prize-act, (and which makes as much a part of it as if it were incorporated with it,) directs that three-eighths shall be given to the captains and flag-officer; one-eighth to the captains of the land forces and marines, and the lieutenants and certain other officers in the navy mentioned in that class; one-eighth to the lieutenants, quarter-masters, ensigns of the land-forces, &c.

(*a*) *Ante*, 164.

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and other naval-officers' mentioned in that class; another eighth to the serjeants of marines, and of land forces, midshipmen, &c., and the remaining two-eighths to the marines, soldiers, seamen, and certain other persons enumerated. Now it is clear that in the distribution of these several shares, except the first three-eighths, the land-forces on board have an interest. But it is equally clear, that they have it, not as a distinct body claiming a separate share by itself, but *per capita*, as individuals in the several classes in which they are placed. On the proclamation, no man can share beyond the rank of captain of land-forces, as claiming under the prize-act, because the rank of field or staff officer has no relation to that situation of land-forces on board a ship, which is marked out by the prize-act. The captain is the distinct commander of his company like a captain of marines. The land-forces act on board the ships in no other capacity than as marines. The plain reason therefore of the prize-act and the proclamation engrafted on it is this; that the land-forces while they are on board the king's ships, shall share rateably *per capita* in the different classes in which they are placed, with the crews of those ships. As to the acting against an enemy in battle, and as to the division of such prizes as may be taken, they are considered as part of the respective crews. With regard to the appointment of agents, the universal practice has been, that the marines and soldiers serving on board the king's ships, have never separately had any part whatever in that appointment. From the manner, indeed, in which the agents are to be appointed, it is manifest that no such separate appointment can take place. The captains of the navy have a right to appoint one or more agents, nobody but a flag-officer can interfere with them; the officers have a right to appoint separate agents for themselves; but there is no provision for the marines or land forces to appoint agents; but they have a share in the appointment in the same manner as they have a share in the prize-money, in the several classes to which they belong. The statement therefore that an agent is duly appointed by the officers and crews of the several ships, is a statement that he is appointed by the captain and sea officers, land officers, seamen, marines and soldiers, who compose the crews of the ships at the time when the prize is taken.

Another objection has been made with respect to the agent, namely, that it is not averred that the authority given to *Taylor* and *Pasley*, survived to *Pasley*. But this objection is evidently without foundation. Each class has a right to appoint separate agents, or they may concur in the appointment of the same, as was
here

here the case. But suppose that each had appointed several agents in different parts of the world; it would frustrate the end of the act of parliament, and be a gross absurdity, if the moment any one of them died, the authority of the others should cease. It might perhaps be a question, if there was only one agent appointed by each class, and he died, or if there were many, and they all died, so that any class should be altogether unrepresented by an agent, whether the others could act *ex parte*, till that defect were supplied. But that is not the case here. *Taylor and Pasley* were appointed by all who by the act had a right to appoint.

With regard to the objection, that supposing there was an exclusive right in the navy, it ought to have been stated to the court of Appeals, and that the superior court ought not to presume that the inferior court would have decided wrong, if the matter had been brought before them; the answer is, that it is a public act of parliament on which the right of the navy is founded. The court of Prize had not only a right to take that act into consideration, but were bound to do it. They were presumed in law to be as cognizant of that act as any court in *Westminster-hall*. It was therefore before the court, and they have decided and acted upon it, in such a manner as would render void the provisions of the statute. Thus much as to the objections made on the part of the defendants, to the several statements in the declaration.

In respect to the inquiry, How the law stood antecedent to the prize acts? the result of that inquiry certainly is, as was stated on the other side, in a former argument, that by the ancient law, captures made in war belonged generally to the captors, because the force employed was not paid by the crown; and that in case of prizes taken at sea, the captors were subject to a contribution to the Lord High Admiral, as an acknowledgement of the authority under which they acted. But when an alteration took place in the military state of the kingdom by the employment of mercenary troops, the principle was established, that where a capture was made by a force employed and paid by the state, the subject of the capture belonged to the state, and not to the captors. The law therefore independent of the prize acts would be this, that where persons acting legally in war and not employed and paid by the state, made a rightful capture from an enemy, part of the prize would belong to themselves; where they were employed and paid by the state, there the prize would wholly belong to the state. The prize acts then intervene in order

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order to give an encouragement to persons commissioned and paid by the state, and accordingly create an equal interest in them with private adventurers, to annoy the enemy, as well for their own emolument as the public service. The policy of these acts seems to be, to put the force of the kingdom in this respect, upon the same footing on which it stood by the antient law. The effect therefore of the prize act is, that as soon as a ship taken is condemned as lawful prize, immediately the property of it is vested in the captors, which would, antecedent to those acts, have belonged to the king. That effect in the present instance is produced by the 19 Geo. 3. c. 67. and the 21 Geo. 3. c. 15. taken together.

It appeared after diligent inquiry (a), sufficiently plain upon the former arguments, that in the practice of the courts of Admiralty, a mixed capture has never been holden to take the case out of the prize acts: whether that capture were by a commissioned and a non-commissioned ship, a king's ship and a private ship of war, or even a joint capture by a naval and military force; a strong instance of which was the case of the ships taken at *Louisburgh*. So that it seems, that no case can be put in which the king's ships are intitled to any share of a prize taken at sea, where it has not been uniformly holden, to be either in part or in the whole within the provisions of the prize-acts. Where any other body of men have a separate right to share, the whole should not be condemned as lawful prize to the king; for the instant that it is so condemned, by the terms of the act of parliament it becomes the sole property of the captors. In this case, therefore, notwithstanding the preamble, if it may be so called, of the sentence of the Lords of Appeal, the legal effect of the sentence is what it ought to be, to vest the prize in the navy as the captors, subject to the individual right of those being on board the king's ships, who were to share by virtue of the proclamation.

It has been said, that as far as relates to the fact of the capture, the plaintiff is to be bound by the recital of the sentence. Admitting this, the defendants are also bound upon the demurrer, by every fact stated in the declaration, which is not inconsistent with the fact stated in the sentence. Now it is stated as a fact on the declaration, and admitted by the demurrer, that the capture was made upon the high seas, by his majesty's ships having the land forces on board at the time of the capture.

(a) After the first argument on the demurrer, the court desired that enquiry to be particularly made.

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But says the sentence, it was made by the conjoint operation of the army and navy. Here then are two allegations on the record, which are, in one sense, binding upon the parties. The plaintiff is, on his part, bound by the allegation of the sentence; the defendants on theirs, admit by the demurrer the facts stated in the declaration. The allegation therefore in the sentence is to be construed in such a manner as shall be consistent with the admitted facts in the declaration. What then is the allegation? that the capture was effected by the conjoint operation of army and navy. What is the fact? that the army was on board the ships at the time of the capture. This explains the allegation. The capture then was made by the conjoint operation of the army and navy: which is the same as saying, it was made by the conjoint operation of seamen and soldiers on board the king's ships; by the seamen under the command of *Commodore Johnson*, and the soldiers under that of *General Meadows*, composing at that time a part of the crews of the squadron. The question then is, What is the effect of the sentence? It is to vest the prize in the naval captors, preserving at the same time the right of the army as individuals, and as making a part of that naval force. The words of the act of parliament cannot have any other fair interpretation. But it is objected, that nothing appears by the sentence, to shew why the act should not have this effect. A doubt was suggested by the court, whether there was a sufficient ground for a prohibition in any thing which the court of Prize had yet done. It was intimated, that supposing the operation of the act to be as the plaintiff contends, yet the sentence ought to be construed so as to give it a legal effect, and not so as to make it illegal, for the purpose of obtaining a prohibition. Now it appears that the court of Appeals have in fact done something contrary to the act of parliament. They have ordered the agent not only to bring in an account of the whole, but also to bring into court whatever is in his possession or power, of the produce of the prize. The order is not to bring in the *residue*, which perhaps might be construed to shew an acknowledgement that the former part had been properly distributed; but it is general to bring in the "proceeds of such part of the ship and cargo as might be in his hands, power, or possession." And *non constat*, but that the court upon bringing in the account, might hold that what had been in his power or possession, and which had been divided without their authority, was within the meaning of the motion. But in
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truth the court of Appeals have no power over any part. By their own condemnation of the prize, the whole belongs to the navy. They have therefore acted in point of fact contrary to the act of parliament, which directs that the produce of the prizes which shall be condemned, shall be placed in the hands of the agent. By looking at the several clauses (a) of the act, there will be seen a regular system framed by the Legislature, directing both substantially and formally, the disposition of the whole of the capture. The appraisement and sale are to be made by, and the produce is vested in the *agent* appointed under the directions of the act. The *agent* is bound to do certain acts by which notice shall be given to all parties interested. The *agent* is to make public notifications before the disposition of the prize. The *agent* is to make similar notifications to *Greenwich Hospital*. In the hands of the *agent* the shares of run men, and the unclaimed shares are to be deposited, the latter to remain there for *three years*. And on non-compliance with the terms of the act, a severe penalty is inflicted on the *agent*. It is the evident intention therefore of the Legislature that the person appointed agent in the manner prescribed by the act, shall be responsible to the parties appointing him, shall be responsible to *Greenwich Hospital*, and shall be responsible to the public. It cannot therefore with any reason be contended, that the court of Appeals have a right, *ad libitum*, to take the whole produce out of the hands of the agent legally constituted, and without any application for this purpose, on the part of any one interested in the business. The moment the Admiralty take the whole out of the hands of the agent, all the provisions of the act which have been enumerated, are rendered ineffectual. It therefore is most clear, that consistent with those provisions, it is not in the power of the court of Appeals, to act as they have done in this case, on the application of any person not interelled in the prize. It is not stated that the monition was prayed for by any of the captors, or that on their part any objection was made to the appointment or conduct of the agent. There might perhaps be a ground for the court of Prize to issue a monition to the agent, to bring in the money of which he was possessed, if there were any charge of fraud or embezzlement made against him by any of the captors, or if for any other reason the money were unsafe in his hands. Possibly at the request of the captors, the court of Prize would take such

(a) Title 19 Geo. 3. c. 6. s. 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49.

a measure for security. But no ground is here stated, no complaint exhibited, nor any application made by the captors to that court, in order to induce them to issue a monition. It is the spontaneous act of the court, to take the money from the only person who can perform the directions of the statute, to whom it is given as a trustee both for the captors and the public, and place it in the hands of an officer, to whom the statute gives no power whatever.

As to the objection, that the motion for a prohibition is not made by the general body of persons interested, but by one captain alone; if that objection were to prevail, it would amount to a declaration, that in case of a capture by a king's ship, the court would never grant a prohibition, unless at the joint request of all parties concerned. But what they have all a right to do collectively, the same right has each to do individually. In the present case indeed, it is almost a physical impossibility that they all should join. As then the court of Appeals has already done some act contrary to the statute, there is ample ground for a prohibition. But it has been suggested, that as the directory part of the sentence admits of a legal construction, this court ought not to infer, that if the money is brought into the court of Appeals, that court will apply it otherwise than the statute directs. But it is a good ground for a prohibition, if there appears reason to believe that the court of Appeals will so apply the money, though they have not actually so applied it. Thus in the case of *Hill & ux. v. Bird, Aylem*, 56. a prohibition was granted to the Ecclesiastical court, because it had threatened to repeal letters of administration without just cause. It was not granted *quia timet*, but because the Ecclesiastical court had manifested an intention of acting contrary to the common law. The same doctrine is laid down, *2 Roll. Abr. tit. Prohibition*, 303. pl. 27 & 28. These cases establish the principle, that where an inferior court plainly shews a design to act contrary to the common law, it is not necessary to wait till they have really so acted, in order to have a ground for a prohibition. In the present case, the court of Appeals have evidently shewn such an intention, both by that part of their sentence which holds the case to be out of the prize-act, and by the order to bring in the money; for that order would be unnecessary unless they meant to dispose of the money in some manner repugnant to the disposition which the statute points out. Upon the whole then of the case it appears, that the court of Appeals

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Appeals have not only acted already in opposition to the 19 *Geo.* 3. c. 67. and 21 *Geo.* 3. c. 15. but have also manifested a clear intention of acting farther in opposition to those statutes. The plaintiff has therefore substantial ground to support, and is not too early in applying for a prohibition.

Hill, in reply, went over the general grounds which he before stated. With regard to the objection on the part of the plaintiff, that great inconvenience would follow, if the agency of *Pasley* had determined by the death of *Taylor*, he argued, that the appointment ought to have been made to them, and the survivor of them, or to them jointly and severally, which would have obviated all such inconvenience. The plaintiff therefore ought not to rest on a possible inconvenience, which might easily have been awarded by a proper method of appointment. As to the argument, that the agent could not execute the several matters which he is required to do by the act, if he had appeared and brought in the proceeds, what is there required by the act that he might not do, and yet have obeyed that process? He might have given all the notifications: the possession of the court would have been his possession, as much as the possession of a receiver: the interest of *Greenwich Hospital* would have been as safe in their hands as in his. There is not any one part of the act, but what might have been performed consistently with the obedience of the agent to the process. If so, the whole of the argument on the other side falls to the ground; and the Lords of Appeal have not contravened the act. The agent indeed need not have brought in the money, but he might have shewn cause upon the process. If he had shewn cause, and they had insisted upon his doing any thing inconsistent with his duty as agent, then and not till then, they would have contravened the act. But it does not appear that the mere issuing of process could disable him to perform his duty as agent, even supposing he *was* agent, which is begging the whole question, and of which the Lords of Appeals had a right to be informed. Suppose *Pasley* had not been agent at all, a monition might then have issued against him; and why should it not, when he does not make his agency appear? The objection therefore, that this application for a prohibition is at least premature, remains unanswered. The application itself is directly contrary to *The King v. Broom*, and many other authorities. In that case there had been a sentence condemning a ship as lawful prize, and after the sentence a libel had issued against *Broom* to compel

compel him to bring in the produce. It appeared that *Broom* had taken the money, as *Pasley* has in this case, as agent for other persons, who were the *African Company*. It was argued in that case, that by the sentence of condemnation a legal right was vested in the king, which was the subject of an action at law, and therefore the court of Admiralty had no right to issue process. The answer to that argument applies with its full force to the case now before the court. The answer was, that notwithstanding the execution of the sentence depended on a legal right, yet it was incident to the jurisdiction of the court of Admiralty, and on that ground the prohibition was refused. There the *African Company* had a right to take prizes; *Broom* derived his power from them; but the common law right which the company had to take did not protect *Broom* from the monition. Neither in this case can the parliamentary right of the captors exempt *Pasley* from a monition. These two cases are parallel. A right derived from an act of parliament is not stronger than a right derived from the common law. All the arguments and reasoning of the court likewise in *Smart v. Wolff*, are fully applicable to this case (a). *Cur. vult advis.*

On this day judgment was pronounced as follows by

LORD LOUGHBOROUGH :—In this case the declaration states, first as a proposition of law, that the exposition of the statute laws of this realm appertains to the king's courts of record. It then recites the prize-act, which passed upon the war against the States General, and his majesty's proclamation for a distribution of prizes, under

(a) In the course of the argument, Mr. Serjt. *Hill* pointed out an inaccuracy in the *Dutch prize-act*, 21 *Geo.* 3. c. 15. the third section of which, after reciting that by the 19 *Geo.* 3. c. 67. & 20 *Geo.* 3. c. 22. "Several provisions and regulations were established for the better carrying on the salutary purposes by the said acts intended in the prosecution of hostilities against *France* and *Spain*," enacts, "that the several regulations and provisions respecting the grant of commissions or letters of marque, the persons acting, and the captures made, under the authority of such commissions or letters of marque, and all other clauses, provisions, matters and things contained in the said acts shall extend, and be construed and deemed to extend to the grant of commissions or letters of marque to the persons acting, and the captures made, under the authority of such commissions or letters of marque, for general reprisals against the ships, goods and subjects of the States General of the United Provinces, and all other matters or things whatsoever in respect of the same, during the continuance of hostilities against the States General of the United Provinces, as fully, simply, and effectually, to all intents and purposes, as if the same regulations, provisions, clauses, provisions, matters and things had been particularly repeated and re-enacted in this act." It is plain, that this section is so worded as to leave it doubtful whether it is meant to extend to any provisions of the two former acts respecting captures made by the *King's ships*, though in point of practice it has been holden to include those provisions. The same ambiguity prevails in the third section of the *Spanish prize-act*. 20 *Geo.* 3. c. 23.

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the authority given by that act. It then states the appointment of *Commodore Johnstone* as commander of a Squadron, of the plaintiff as captain of a ship in that Squadron, and of *General Meadows* as commander in chief of the land forces, to be employed on an expedition against the *Cape of Good Hope*, a colony of the States General in *Africa*, and secret instructions given by his majesty, directed to the two commanding officers *Commodore Johnstone* and *General Meadows*, in order to prevent disputes which might arise between the fleet and army. By these instructions it was provided, that such booty as should be taken from the enemy by the joint operation of the fleet and army at the attack of the *Cape*, should be distributed among the land and sea forces into two shares; the share of the navy to be divided according to the regulations established for the service. The declaration then states, that the Squadron with the land forces on board proceeded upon the said expedition; but did not make any attack upon the *Cape of Good Hope*.

It then states, that upon the 21st of *July* the Squadron, with the ship of which the plaintiff was captain, having the land forces on board, did in a certain open unfortified bay, called *Saldanha Bay*, at a great distance from the *Cape of Good Hope*, attack and seize as prize the ship *Hoogskarpell* and cargo, the property of the subjects of the States General. The declaration then states a libel in the High Court of Admiralty, by his majesty's proctor, for the condemnation of the said ship as lawful prize, being taken by *Commodore Johnstone* and his Squadron, and a sentence thereupon upon the 4th of *September* 1782, condemning the ship and cargo as good and lawful prize generally; reserving the question, Who were captors? and afterwards upon the matter reserved, on the 28th of *May* 1785, an interlocutory order of the court of Admiralty, pronouncing for the interest of the army generally, agreeable to the spirit of his majesty's instructions, and decreeing the distribution of the prize, according to such instructions, in equal shares. The declaration then proceeds to state an appeal from this last decree upon the 30th *June* 1786, and a decree of the court of Appeals, reversing the last mentioned decree of the judge of the High Court of Admiralty, and pronouncing the ship and cargo to have been taken by the conjoint operation of his majesty's ships employed on an expedition against the *Cape of Good Hope*, under the command of *Commodore Johnstone*, and of the army under the command of *General Meadows* upon the same expedition, and condemning the ship
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with the unclaimed cargo, as good and lawful prize to the king. The declaration then states, that *Edward Taylor* and *John Pasley* were duly appointed agents by the officers and crews of the several ships' companies of the Squadron, and as such agents, soon after the decree of the 4th of *September* 1782, caused the ship and her cargo to be sold, received the produce, distributed part thereof among the officers and crews of the Squadron, and that the residue remained in the hands of *Pasley*, and ought to be distributed to the captors aforesaid, pursuant to the statute and proclamation. It then states, that the plaintiff *Home* brought his action in the court of King's Bench, of trespass on the case on promises, against *Pasley* the surviving agent, (*Taylor* being stated to be dead,) for damages for the non-payment of his share. It then states as a proposition of law, that the commissioners of appeals in prize causes have no authority by law to take out of the hands of any agent so appointed, the money arising from any sale of prizes finally adjudged lawful prize to his majesty in a court of Admiralty. That the commissioners of appeals contriving to take out of the hands of *Pasley* the money, and to prevent the plaintiff recovering at law his damages, did, on the 3d of *May* 1788, issue a monition to *Pasley* to bring in an account of sales, together with the proceeds. This is the whole of the declaration. The defendant traverses the last allegation of process issued against the prohibition, and demurs generally to the rest of the declaration. This general demurrer consequently admits all such facts stated in the declaration as are well pleaded.

Upon the last argument three objections were taken to the statement of the declaration, to shew that upon the face of the declaration, the plaintiff has not made out a case which intitles him to a prohibition. I shall mention these objections very briefly, because to each of them, as it seems to me, a very short and distinct answer occurs. The first I shall take notice of was that, by the plaintiff's own shewing, he and all the Squadron have forfeited their share in the distribution of the prize, because part of it was distributed before final sentence of condemnation. It is of no moment to discuss whether there was any such cause of forfeiture, because the objection mistakes the state of the declaration; which indeed states that part had been distributed, but also expressly states, that it was after the sentence upon the 4th of *September*, against which sentence there is no appeal, and which was an adjudication, condemning the ship and cargo as lawful prize.

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prize. The second objection is, that the appointment of *Taylor* and *Pasley* as agents for the officers and crews of the Squadron, is not well set forth, from an expression in the statute which says that the officers and crews and others having interest in the prize, shall appoint agents, and then marks out the manner in which they are to be appointed. The subsequent part of that clause of the act sufficiently shews that no other persons but the officers and crews of the Squadron can have any concurrence in the appointment of agents. There may be four agents; one appointed by the flag-officer, another by the captains, another by the lieutenants and other officers of that rank, and another by the private men and those who are in the fifth class according to the proclamation, to share the amount of the prize. There is no other description of persons who can under the act concur in the appointment of agents. But that is rather going further than is necessary for an answer to the objection; for this is not a case where the agents are parties appearing as plaintiffs, setting out a title; but the plaintiff *Home* who is to make out his own title distinctly, states as a fact that agents were duly appointed. This is undoubtedly sufficient upon a general demurrer. If there is any objection to the appointment of agents, and if that objection would be sufficient to turn round the plaintiff in this case, it ought to have been set forth more particularly. Upon a general demurrer, the allegation that the agents were duly appointed is certainly sufficient. Another objection was, that the authority of the agents was determined by the death of *Taylor*. Now, though this too is of no moment upon a general demurrer, it is also not true; because this is not a mere authority given to *Taylor* and *Pasley*; they have an interest in the proceeds of the prize, and it is certain that where persons are appointed with an interest vested in them, the interest survives. The surviving agent *Pasley* being possessed as agent, he must continue to be accountable to those who have appointed him, in the character of agent. It was totally immaterial whether *Taylor* had remained; all the interest that was in *Taylor* is now in *Pasley*; all that *Pasley* possesses, and all that *Taylor* together with him possessed, *Pasley* is chargeable with. He received it in the character of agent, and is answerable for it in that character. All these objections were overlooked in the former arguments; and for the reasons I have given, the court are of opinion that they are of no weight.

Upon the three first, and the latter part of the last argument, the case has been very fairly debated on its real merits. The
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court has given all the scope to the question which the importance of it required; first on the motion for a prohibition, then upon three arguments on the demurrer: and we are all unanimously of the opinion which I shall close with delivering. The prohibition was prayed upon a ground which has never been disputed, that it belongs to the courts of common law to controul the proceeding of all other courts if they transgress the limits assigned to them; and the argument for the demurrer has fully admitted the proposition upon which the declaration is built to be good in law, namely, that the exposition of the statute law of the land appertains to the king's courts of record, and ought to be discussed and determined in those courts. The general grounds upon which the courts of *Westminster-hall* proceed in matters of prohibition, were so fully discussed in a late case (a), and when the court in that case disposed of the motion, that I avoid entering into them, and assume it to be a clear ground for over-ruling the demurrer in this case, if it shall appear upon the face of the declaration that the plaintiff has a legal right founded on an act of parliament, and that the commissioners of prize are proceeding to deprive him of that right, or to obstruct him in the prosecution of it. On the other hand, if the plaintiff has either no such right, or the commissioners of appeals are not proceeding to act in opposition to it, the demurrer must be allowed. It was admitted on both sides, and is certainly true, that the general question of prize does not belong to the courts of common law. By general question of prize I mean a question, Whether a ship or goods taken at sea be lawful prize or not? It was admitted also, that when there is an adjudication of prize by the court of Admiralty, the rights which an act of parliament gives respecting that prize are the subject of actions at law, and are cognizable in the courts of common law.

The argument in support of the demurrer maintains these propositions. First, that this appears to be a case in which the king's ships were not the sole captors; 2dly, that the act of parliament vests a right to the prize in the king's ships, only in the case where they are the sole captors; 3dly, that the court of Prize has a general authority in all cases to distribute the shares of the prize, and therefore that the proposition with which the declaration concludes, namely, that the commissioners of prize have not by law authority to take out of the hands of the agent, the

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(a) Vide *Brymer v. Atkins*, ante, 164.

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money arising from the sale of prizes, is not a true position; but that on the contrary, the commissioners have a right to order those possessed of the produce to bring it into that court. The first proposition then to be maintained on the part of those who support the demurrer, is a proposition of fact, namely, that this appears to be a case in which the king's ships are not the sole captors. This is founded upon the terms of the two sentences which are set forth in the declaration, together with the facts stated, that the fleet and army were destined upon a joint service, and were both concurring in the capture. From reading the declaration attentively, it certainly does not appear that the *army as such* gave any aid to the capture. When I say the *army as such* gave no aid to the capture, I mean to exclude the case of the *army being stationed on board the fleet* at the time of the capture. For though they are distributed amongst the ships, yet they are not acting there *as an army*, but are only part of the force that is on board each respective ship. In that situation the soldiers and officers are concurring in the capture, but no otherwise concurring than as any passengers on board might be. When I speak of the *army as such* concurring in the capture, I am to be understood to mean a concurrence, in which the land forces acting under the command of their proper officers, are carrying on some operation or other that may be conducive to the object, in what the fleet acting as a fleet is concerned. It cannot be therefore taken from the facts stated in the declaration, that *the army as such*, was in any respect operating towards the capture of the ship in question. The statement of the declaration is, that the squadron of which the plaintiff's ship was one, with the *army on board* took the prize. If, therefore, it was necessary for the defendant to avail himself of this fact, it would have been proper for him to have stated by a plea the manner in which the army acted, and what was the co-operation of the army towards the reduction of this ship stated to be taken upon the High Seas. But upon a demurrer we must take the fact as it stands upon the face of the declaration. I will now proceed to see whether the sentences will aid the demurrer in the assumption of the fact, that the king's ships were not the sole captors. The first sentence of the High Court of Admiralty holds the army according to the spirit of the instructions, to be intitled to a share in the capture. But certainly in that sentence there is no conclusion whatever to be drawn, that the army was in fact, *as an army*, active in the capture, or in any respect operating towards

towards it. According to the spirit of the instructions giving the utmost latitude to that expression, the judge might suppose the strength of the fleet increased by the accession of the army, and therefore, taking the case itself to be within the instructions, that the army was intitled to a share. The other sentence states, that the capture was made by the conjoint operation of the ships and troops. Now both these sentences are perfectly consistent with the allegation of facts stated in the declaration, that the troops were on board the fleet. Being on board the fleet, it cannot be said that they had no share at all, were of no weight, or of no moment in the reduction of this particular ship. Therefore literally taken it might be true, that the capture was the effect of the general efforts of all that were on board, whether in the character of seamen, or soldiers. But this by no means furnishes a state of facts to shew any accession of the army, *as an army*, to the reduction of the ship in question. Upon those grounds therefore I shall feel myself bound upon the demurrer to hold that the plaintiff has shewn a title of sole captor, in the squadron of which his ship was a part, and that he will of consequence be intitled to a prohibition, if in the sequel of the declaration, he has shewn any act done by the court of Prize contrary to his right.

In considering the second proposition, which is, that the act of parliament vests a right to the prize only in the case where the king's ships are the sole captors, I will go a little out of the record, and take for granted as a matter of supposition, what I think ought to have been introduced in a plea upon the record, if the defendant wished to avail himself of it. I will take the supposition, that the army had landed, and given assistance from the shore, in any mode in which such assistance to a capture afloat could be given. Upon that supposition, the question will be, Whether the consequence drawn from it is true, and can be maintained? The first sentence holds the army as such to be intitled to a share; which may be, though the right was vested in the king's ships; for there might be others concurring in the capture, who would be intitled either upon the ground of assistance, or upon some grounds, which it is not necessary for me to state, to have a concurrent interest with them in the produce of their share. But it by no means follows, that the fleet, because of another body concurring in assistance, shall have no vested right. The second sentence has been argued, and I believe it has been argued very justly and fairly according to the intent of it, to proceed

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upon this supposition, namely, that the case of a co-operation of another force besides that of the king's ships, takes the case entirely out of the prize-act. That proposition undoubtedly is not stated in terms upon the face of the sentence. But it has been argued to be the ground of the sentence; and I take it that it was the ground. I take it according to the argument, which was insisted upon in support of that sentence, that when the sentence proceeds to say, that it shall be condemned as lawful prize to the king, it does not mean merely to pronounce that it is lawful prize, (for that is the form of the adjudication where the right is unquestionably in the captors, where there is no controversy, nor any dispute made upon it,) but that it means that the right is vested in the king by his prerogative, and that it is at his majesty's disposal. Now the prize-act says in distinct terms, that the officers, &c. of the king's ships shall have the *sole interest and property* in all ships and cargoes, &c. which they shall take, being first adjudged lawful prize. These are the terms of the statute. Antecedent to any statute upon the subject, there is no doubt but that by the law of the realm the property of prizes taken by the king's ships was in the king. The effect of the prize-act is a parliamentary gift by the king of that interest, which his majesty would have had in the prizes, to the officers and crews of the several ships of the fleet, and to the owners of the privateers which shall have been fitted out under the directions of the act. The expressions of the act are distinct and plain, and the operation of it is, to transfer to those who are to take, all the interest which antecedent to the act was in the king. It respects only prizes taken at sea; the expression is that they shall have the *sole interest and property*; but certainly that mode of expression does not exclude the case of a joint capture; which joint capture may either be, by a king's ship and foreign allied force, (in a case where this country is carrying on a war in conjunction with some other state of *Europe*,) by a king's ship and a private ship of war, or by a king's ship and a non-commissioned ship. In every one of which cases, the property of what the king's ships take, has uniformly and repeatedly been adjudged to the officers and crews of his majesty's ships. They are *solely intitled* to what they take, not to what they *solely take*; that is not the expression of the act. So far as they are the captors, no other power has any right to interfere with them. Where there are others, (whether an allied force, a private ship of war, or a non-commissioned ship,) also captors, they have

have a right, in some cases as for a *quantum meruit* for assistance given ; in others, they have been holden to have a distinct and specific share in the capture. But that in no case destroys the right which the king's ships *solely have, quoad that capture which they have made.* They have a *vested property* in what they take. The second section of the act goes on and says, in like manner, ships taken by privateers shall wholly and entirely belong to the owners, to be distributed according to the contract they have entered into. That cannot be holden to exclude the privateer, by any fair construction of the words, in cases of joint capture. Suppose this case to happen ; a king's ship and a privateer are jointly and equally concerned, and equal in point of force, in the reduction and capture of an enemy's ship. Would it be a reasonable construction of the act, to say to the king's ship, "the prize is not your sole property ;" to the privateer, "it cannot wholly and entirely belong to you ; it was taken by you both conjointly, therefore it shall belong to neither of you." The proposition seems to me to be morally impossible. The interest of the king's ship, which would in that case be in a moiety of the prize, would be an interest to them *solely* ; the interest of the privateer, in the other moiety of which they would be the captors, would wholly belong to them, to be distributed according to the contract they might have entered into with their owners. These cases are perfectly clear, and have been determined in instances so numerous, that it is quite unnecessary to enter into a detail of them : they have been referred to in the course of the argument. This is the case of a joint expedition by sea and land forces, and of an operation, whereby the enemy's ships are reduced ; the ships being always supposed to be taken on the high seas. It varies the case, where the object has been the reduction of a part of the enemy's territory. The consequence of that reduction may be the acquisition of property afloat, of ships of war taken in a harbour, of ships coming into a harbour after the place has been reduced. In all these cases, perhaps it would be difficult to say that the capture was made by the king's ships. If a garrison town with an inclosed harbour had been reduced, and the ships had fallen with the place, and as a consequence of the taking of the place, or of the reduction of the country ; these could not be deemed to be captures made by the king's ships. As such cases might possibly happen, where expeditions have been undertaken at sea in foreign parts, by the naval and military forces of this

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In the case of the *Pondicherry* prizes, several actions were tried upon them before me. Those agreements had been made between the superior officers, between the captains of the navy and the officers of the same rank in the army, but had been refused to be made between the third class in the distribution, the lieutenants of the navy, and the captains of the army; the lieutenants of the navy had refused to concur in it. Though in the other classes, the land forces were admitted to share, they were not admitted to share in *that class*, with respect to the prizes taken at sea; and a recovery was had against the agent on that ground. But I am arguing this case much further than there is occasion to go; for admit for the purpose of the argument, that a co-operation might take effect so far as to give a right to the army to share, does it follow from the army being intitled to share, that the co-operation of the army should destroy and annul totally the right of the navy? That conclusion is a great deal beyond the premises. The interest in a prize taken at sea (of which I am always speaking) may, by possibility, (I do not say that it cannot,) be shared or distributed, but it cannot be taken away. The interest which is vested, after the adjudication of lawful prize, in consequence of a parliamentary grant, cannot be

be annulled or destroyed. If upon any merits, or upon any ground upon which assistance may give a right to share it, a share may be imparted to others, that share can be ascertained and supported. Yet the very supposition that it is a share, admits that it must be a share of something which is vested in somebody. The proposition contained in the sentence supposes that the right which the navy would have had by law to every thing that is taken afloat, is by the intervention of another power co-operating with the navy taken away and destroyed: which appears to me to be a proposition directly contradictory to the act, and not founded at all, in consequence of the parliamentary gift in favour of the officers and crews of his majesty's ships. If it could be supported, it would undoubtedly reverse all the cases where a co-operation by a non-commissioned ship, or a privateer, or a foreign allied force intervenes. But in none of these cases could it be said, the king's ship was not solely intitled. The proposition must be either general, that the king's ships can take a vested right in no case where assistance is given them, or that they must in all cases, where they are captors, have a vested right, subject to such claim for assistance, or any other party can make against them. I have in this part of the argument, as I said before, gone out of the record: it is now fit I should return to it.

When I say, that upon the facts stated in this declaration, and admitted by the demurrer, it does not appear that there was such assistance given by any other force, as to make it a joint-operation, but that the king's ships had reduced this prize, and taken it; it must be remembered that the subject of the capture has been adjudged to be lawful prize, taken by the ships having the king's forces on board; in which respect the king's forces are intitled to come in for a participation under the act and proclamation. But that does not prevent a right from vesting, but on the contrary, establishes that the right is vested, for it is under the proclamation founded upon the act of parliament, that the troops are intitled to such share as upon the face of this declaration belongs to them. I now come to the terms of the sentence, and I own that for some length of time, they raised considerable doubt in my mind, what would be the result of this question, and what would be proper for the court to do in disposing of this demurrer. It is possible to understand the sentence consistently with the right of the navy. For the premises assumed by the sentence do not appear to form a conclusion, that the

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1790. navy are not intitled. It is not inconsistent with the supposition that the navy is intitled; and I might understand the sentence, where they adjudge it prize to his majesty, (in the common way in which sentences are pronounced,) not to be inconsistent with that right, if the court had gone on to pronounce afterwards, that it should be distributed according to the terms of the proclamation, though it had contained this recital, that the prize was effected by the conjoint operation of the land forces, as well as by the officers and crews of his majesty's ships. But then after the sentence passed, the declaration states that a monition issued upon it. Considering the terms of that monition, I am perfectly clear in opinion that it gives a different construction and a different effect to the sentence. The monition is not against the agent merely to account for what he has received, and to bring in the account of sales and disbursements: but it goes on, and directs the agent to bring into the court of Appeals the proceeds of the cargo remaining in his hands. It was argued for the plaintiff, that the terms of the monition were large enough to extend to the effect of overhauling the partial distribution already made, and to oblige the agent to bring in all that had been in his hands. I do not think it could have that construction. I take it to be directed simply to bring in the residue, what is in his hands; but also that it directs the agent to bring into the court of Prize the proceeds of the prize in his hands. Now such a monition is a very usual step taken either by the court of Admiralty, or by the court of Appeal in prize causes, where the subject of the suit, the ship or goods, are not deemed legal prize, and where of course they are not vested in the captors, in order to make restitution. The agent who has got the proceeds in his hands, may be directed to bring in those proceeds, that they may be restored to those to whom they belong. But I do not find that any instance could be quoted, where a monition had issued against the agents to bring in the proceeds of the prize, in a case where it had been *adjudged lawful prize*, and of course where upon that adjudication, it was to be distributed either to a privateer, or according to the terms of his majesty's proclamation, to the officers and crews of the different ships intitled. And I think it cannot be; for the act has made very special provisions with respect to the payment of shares after adjudication; upon which adjudication a legal right is vested. The agents are to be nominated by different classes of people

people intitled, as I have stated. Every step of the duty of the agents is under the directions of the act. They alone are to make the sales and appraisements. All the produce of the prize is to be put into their hands. They are then to give public notification of the times of payment, so many days before actual payment is made. They are directed after such notification, to make payment according to the prize lists, and in the proportions in which the parties are intitled. They are directed to give an account, from time to time, of all their proceedings. They are directed to furnish *Greenwich Hospital*, in which, by law in certain cases, an interest in every prize vested in captors, is also vested, with accounts in order to ascertain that interest. They are throughout the whole course of the act, supposed to be subject to actions, at the instance of those who are intitled to share in the prize. It is a legal vested right, and the method of obtaining the effect of that right is by action against the agents. In particular cases they are furnished by the statute with a defence to the action. As in the case where men bring an action against the agent, for a share having been marked *Run*, it is by the statute a sufficient defence to the agent, and he is intitled to a verdict in his favour, if the plaintiff does not ground himself upon a certificate that the *R.* has been taken off. If he fails in any part of the duty imposed upon him by the act, a penalty to be recovered in the courts of *Westminster-hall*, meets him at every step. The intention of the act is obvious, and perfectly squares with the rules of law, that the prize being adjudged by the court of Admiralty, distribution of the interest in that prize, is to be managed as the distribution of any other legal vested right is according to the laws of the land, namely, by action in the courts of law. I do not care to lay it down, for I am not able to say that I am perfectly sure that I see the whole extent of all possible cases that may occur, I do not care to lay it down, that there is no possible case in which the agent of a prize may not be ordered by the court of Admiralty, or court of Prize, to bring in the actual proceeds of the prize. Yet I profess I have not been able to figure to myself what that case can be. Suppose a case in which it is suspected that the agents are insolvent or likely to become insolvent, and that for the safety of those interested, it was desirable to take the money out of the agent's hands, and lodge it in some safe custody. That appears to me, speaking conjecturally, to be a possible matter to be done by the court of Prize;

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1790. Prize; for I should doubt whether in such a case an application could be made to the court of Chancery to secure the money. The court of Prize could not indeed make the distribution themselves, nor do I find that any such application has been made to them.

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Could there then be a suit against the agents for distribution? A suit for distribution might be well maintained in the court of Admiralty; or if the case were got into the court of Appeals, in that court. But what would be the decree to be made upon that? it would be a personal decree upon the agent; the distribution would be directed, the shares allotted, and then upon that decree, the agents might be proceeded against personally. It would be a contempt of court if they did not make payment according to the order. Yet there would be a much better way, a more effectual one, by an action immediately grounded upon the right vested, and the *quantum* of that right ascertained by the order of distribution. But the court itself cannot, as I conceive, take into their own hands to direct the proceeds of the prize to be paid over to their registrar, for the purpose of distributing it. The registrar is liable to none of the provisions of the act to which the agent is liable. The agent is liable to an action. But I am at a loss to conceive, if the agent is directed to pay over all the money, how the action for money had and received could be maintained in effect against him, that money having been taken out of his hand. I am still more at a loss to conceive, how it could be maintained against the registrar. What sort of an officer is the registrar? Is he to make distribution? No. Is he to make notification? No. The act directs that to be made by the agent. Is he subject to any penalty? No, he is not the person to whom the act is directed, to whom the duty is enjoined, and who is answerable for the breach of that duty, in an action to be brought. Would the agent be protected in an action for the penalty? It would be hard that the agent should be liable to it, but I do not see upon the face of the law, how he could be furnished with a defence, for the non-performance of the duty enjoined by the act. But none of these remedies can take place against the registrar. Therefore it seems the clear direction of the act, that the money is to remain in the hands of the agent, liable to the actions of those who have a legal vested right in it: that to those persons the agent is accountable, that against the primary interest of those persons, the money is not to be

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be taken out of the hands of the agent by order of the court of Prize. The construction which has been put upon the second sentence is, that there was no vested right in this prize in the officers and crews of his majesty's ships, nor in the army; but that upon the ground stated in the sentence, the whole was vested in his majesty by his prerogative; and was to be disposed of to such uses as his majesty should think fit. With that construction of the sentence the monition which has issued is perfectly consistent; but not with the idea, which we take to be a well founded idea, that by force of the act, after the adjudication of lawful prize, the plaintiff and all other officers, and the crews of his majesty's squadron, have a vested legal right. The effect of the monition is directly in prejudice of the right of action of all other persons concerned; it interferes with the legal duty imposed upon the agent, and subverts and overturns the law with respect to the duty and situation of agents, where they are acting for persons having a vested right in prizes. It is not necessary to have recourse to those cases cited of Lord *Anson* and the others, because the proceeding in this case prevents the plaintiff from recovering his legal vested right, at least it disturbs him in the recovery of that right, if not totally prevents him, and subjects the agent, and all others who are interested in the acts of the agent, (*Greenwich Hospital* included,) to the courts of Prize. Whereas according to the construction, which we are of opinion ought to be given to the prize-act, all those rights are to be enforced in *Westminster-hall*, belong to the courts of *Westminster-hall*, and do not belong to the courts of Prize. These are the grounds which I have gone through, without referring to the cases that have been cited by name. Those cases are very well known, are in the memory of every one, and will all be found in the recollection of the argument. The ground upon which we proceed is, that upon the face of this declaration, the plaintiff has a *legal vested right* in the subject of the monition; that the court of Prize cannot deprive him of that right, cannot do an act prejudicial to that right, and cannot prevent or obstruct him in the recovery of that right. The demurrer therefore must be over-ruled, and

Judgment given for the plaintiff in prohibition (a).

(a) [But this judgment was reversed on a writ of error to the court of K. B. who refused to grant the prohibition; on the ground that the Prize courts and courts of Appeal have the sole and exclusive jurisdiction over the question of prize or no prize, and *Who are the captors*? notwithstanding any of the prize-acts; and that if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common

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common law cannot examine the justice or propriety of it, even though perhaps they would have put a different construction on the prize-afts.—And that the same courts have power to enforce their decrees. 4 *Term Rep.* B. R. 382.

The judgment of the court of K. B. was affirmed in the House of Lords, though not altogether on the same considerations. See *post.* vol. 2. p. 533. and *Parl. Cases*, 8vo, vol. 6. p. 203.]

The following Rules were made this Term.

[526]

“ IT is ordered, that from and after this term, no *bail-bond* taken in *London* or *Middlesex*, by virtue of any process issuing out of this court, returnable on the first return of any term, shall be put in suit until *after the fifth day in full term*; and that no bail-bond taken in any other city or county by virtue of such process, shall be put in suit until *after the ninth day in full term*; and that no bail-bond taken in *London* or *Middlesex*, by virtue of any process issuing out of this court, returnable on the second or any other subsequent return of the term, shall be put in suit until *after the end of four days*, exclusive of the day on which such process shall be expressed to be returnable; and that no bail-bond taken in any other city or county by virtue of such last-mentioned process, shall be put in suit until *after the end of eight days*, exclusive of the day on which such last-mentioned process shall be expressed to be returnable, upon pain of having all proceedings made upon such bail-bonds to the contrary thereof, set aside with costs: any former rule or order of this court to the contrary thereof in any wise notwithstanding.”

“ IT is ordered, That from and after the first day of *Michaelmas* term next, every fine at the time of the signing of the Judge's *allocatur* thereon, shall have the *writ of covenant sued out and annexed thereto*. And it is also ordered, that from and after the first day of *Michaelmas* term next, in every common recovery wherein the vouchee or vouchees shall personally appear at the bar of this court, for the purpose of suffering such recovery, the *writ of entry shall be sued out and produced* at the time of the recording of the vouchee or vouchee's appearance at bar, at the foot of the precipe in such recovery. And it is further ordered, that from and after the first day of *Michaelmas* term next, on every common recovery wherein the vouchee or vouchees' warrant or warrants of attorney shall be taken under a *dedimus potestatem*,* the *allocatur* of the Lord Chief Justice or some one or other of the justices of this court, *shall be indorsed in*

* [See the next page.]

the same manner on *allocaturs* are now indorsed on fines taken by *dedimus potestatem*, by virtue of the several rules and orders of this court in that behalf made; and that at the time of indorsing such *allocatur* in every such common recovery taken by *dedimus potestatem*, the writ of entry shall be annexed thereto together with the affidavit or affidavits of the caption or captions of such warrant or warrants of attorney respectively.”

Loughborough.

H. Gould.

J. Heath.

J. Wilson.

THE END OF TRINITY TERM.

The following Rule of last *Trinity Term*, (*ante*, 526.) was amended, by the insertion of the words marked with inverted commas. [527]

In the Common Pleas.

Trinity Term, in the Thirtieth Year of the Reign of King George the Third.

IT IS ORDERED, That from and after the first day of *Michaelmas* term next, every fine, at the time of signing the judge's *allocatur* thereon, shall have the writ of covenant sued out and annexed thereto.

AND IT IS ALSO ORDERED, That from and after the first day of *Michaelmas* term next, in every common recovery, wherein the vouchee or vouchees shall personally appear at the bar of this court for the purpose of suffering such recovery, the writ of entry shall be sued out, and produced at the time of the recording of the vouchee or vouchee's appearance at bar, at the foot of the *præcipe* in such recovery.

AND IT IS FURTHER ORDERED, That from and after the first day of *Michaelmas* term next, in every common recovery, wherein “the tenant or tenants, or the” vouchee or vouchees, warrant or warrants of attorney shall be taken under a *dedimus potestatem*, “there shall be written on every copy of the
“ *præcipe*,

“ præcipe, and of such warrant of attorney having such affidavit
 “ or affidavits as is or are required by the rule of this court made
 “ in *Hilary* term in the fourteenth year of the reign of his pre-
 “ sent majesty, thereto annexed the *allocatur* of the Lord Chief
 “ Justice, or some one other of the justices of this court, in the
 “ same or like manner as *allocatur*s are now written on fines
 “ taken by *dedimus potestatem*; and the copy of the præcipe and
 “ warrant or warrants of attorney, with the *allocatur* thereon,
 “ shall be filed as directed by the said rule: And that, at the
 “ time of signing such *allocatur*, the writ of entry for such com-
 “ mon recovery shall be produced before the judge signing such
 “ *allocatur*, who may mark such writ with his title, name, or
 “ initials thereof; and such writ shall also be produced at the
 “ time of the arraignment of such recovery.”

BY THE COURT.

Mr. Justice WILSON was absent during the whole of the
 two following terms, being under the necessity of going to
Lisbon for the recovery of his health.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Thirty-first Year of the Reign of GEORGE III.

GOOCH v. PEARSON.

Thursday,
Nov. 18th.

ON a former day *Kerby*, Serjt. moved for judgment as in case of a non-suit, for not proceeding to trial in due time after issue joined, upon which the plaintiff entered into a peremptory undertaking to try his cause. But this undertaking not being performed, on that ground *Kerby* now again moved for judgment as in case of a non-suit. It was objected that this motion was irregular, because no notice of motion had been given according to the statute (*a*); in answer to which *Kerby* argued, that as notice of the original motion had been given, the terms of the statute were complied with, and no notice of the present motion was necessary. But the court after looking into the statute were very clearly of a different opinion, and having inquired of the secondaries as to the practice, (who said that in this respect there was no difference between the two motions,) *Refused the rule.*

Although notice has been given of a motion for judgment as in case of a non-suit, for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet notice must be given of the like motion for not proceeding to trial in pursuance of the undertaking.

(a) 14 Geo. 2. c. 17.

1790.

Saturday,
Nov. 20th.MARTIN & Ux. Administratrix of NORFOLK v.
NORFOLK, a Bankrupt.

Where the defendant pleads the general plea of bankruptcy, to an action brought by an executor or administrator, and obtains a verdict, the plaintiff is not liable to costs on 5 Geo. 2. c. 30. s. 7.

TO this action of *assumpsit* on promises made to the intestate, the defendant pleaded the general plea of bankruptcy, and obtained a verdict. And now *Le Blanc*, Serjt. moved that the prothonotary might be directed to tax the defendant his costs, on the ground that by the *stat. 5 Geo. 2. c. 30. s. 7.* if a bankrupt were sued for a debt due before the bankruptcy, “and if a verdict pass for the defendant, or the plaintiff shall become non-suited, or judgment be given against the plaintiff, the defendant shall recover his full costs.” He argued that this statute contained no exception in favour of executors and administrators; that if it had been the intention of the Legislature to make such an exception, it would have been expressed, as in the *stat. 8 & 9 W. 3. c. 11.* the 5th section of which provides, that “Nothing therein contained should be construed to alter the laws in being as to executors and administrators in such cases where they were not then liable to the payment of costs of suit.” It could not indeed have been the design of the Legislature in *5 Geo. 2. c. 30.* to exempt any plaintiff from paying costs to the bankrupt, who was divested of all his property, and had not otherwise the means of defending actions which might be brought against him.

Bond, Serjt. *contra*. The statute *5 Geo. 2. c. 30.* must be construed in the same manner as others *in pari materia*. Now the *23 Hen. 8. c. 15.* and *4 Jac. 1. c. 3.* which first gave costs to defendants where they gained a verdict, are general in their expressions, and make no exception of the case of executors and administrators; and yet it has been uniformly holden that those statutes do not extend to executors and administrators. *Cro. Eliz. 69. Forde v. Rolis, Id. 503. Featherstone v. Allybone, Cro. Jac. 229. Haywarth v. David.* They sue *en auter droit*, and are presumed to do the best for the estate of those whom they represent; but as they are not supposed to know precisely the rights of the testator or intestate, and the extent of his contracts, no malicious motives are to be imputed to them, in bringing an action, and costs are given in lieu of the amercement *pro falso clamore*

clamore: the same doctrine is recognized in *Bligh v. Cope*, 1790.
Barnes, 142. (a)

MARTIN
 v.
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Le Blanc replied, that though it was true, that executors and administrators were presumed not to be fully cognizant of the rights of the testator or intestate, and therefore not actuated by malicious motives, yet that rule was not applicable to the present case, a commission of bankruptcy being a matter of public notoriety, of which the plaintiffs might have informed themselves, and of which they could not be presumed to be ignorant. For the same reason the authority of *Bligh v. Cope* was not in point, since the fact of the defendant in that case being a fugitive was not open and notorious. But

The court held the plaintiffs not liable to costs, being clearly of opinion that the stat. 5 *Geo.* 2. c. 30. ought to be construed in the same manner as 23 *Hen.* 8. c. 15. and 4 *Jac.* 1. c. 3.

Rule refused.

(a) Last edition.

DAWKINS v. REID.

Wednesday,
 Nov. 24th.

BAIL were put in to the action in due time, yet the bail-bond was assigned and proceeded upon. In consequence of this, a rule was granted to shew cause why the assignment and all subsequent proceedings should not be set aside.

Where bail are put in in due time the defendant is not bound to give notice, but the plaintiff must search in the Filazer's Book. Otherwise, if they be not put in in due time.

Bond, Serjt. shewed for cause that the defendant had not given notice of bail, which he said was necessary. *Adair*, Serjt. answered, that the plaintiff was bound to search in the Filazer's Book, and that though notice in such case was frequently given, it was a matter of favour rather than of right: but he allowed that if the bail were not put in in due time, then notice must be given.

The court were of this opinion, and therefore made the

Rule absolute (b).

(b) See *Impey's New Instr. Cier. C. B.* 3d edit. 156.

ANDREWS v. BLAKE.

Thursday,
 Nov. 25th.

THIS was an action of *assumpsit* on a bill of exchange, in which the defendant let judgment go by default. In

Where there is judgment by default on a bill of exchange, the court will refer it to the prothonotary to ascertain the damages and calculate interest without a writ of inquiry.

a bill of exchange, the court will refer it to the prothonotary to ascertain the damages and calculate interest without a writ of inquiry.

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consequence of which a rule was granted to shew cause why it should not be referred to the prothonotary to ascertain the damages and calculate interest on the bill, without a writ of inquiry. *Kerby*, Serjt. shewed cause, contending that the court could not dispense with a writ of inquiry in an action of damages; and he stated the principle to be, that the intervention of a jury was necessary in all cases, where the debt really due did not appear upon the face of the declaration.

Lawrence, Serjt. in support of the rule, relied on the case of *Rasbleigh v. Salmon*, (*ante*, 252.) where on a judgment by default on a promissory note, the same reference was made to the prothonotary as was desired in the present instance. The court said, that as it would be the means of saving expence to the parties, as the amount of the bill appeared on the face of it, and the interest might be exactly calculated, they thought it right to make the Rule absolute, which was accordingly done (*a*).

(*a*) *Vide* [*ante*, *Rasbleigh v. Salmon*, 252. and the note there, and] *post*. 541. *Longman v. Fenn*.

Monday,
 Nov. 25th.

THRALE and others v. The Bishop of London and others.

Though the defendant have judgment on demurrer in *quare impedit*, he is not intitled to costs [under stat. 8 & 9 W. 3. c. 11.]

IN last *Hilary* term (*a*), judgment was given for the defendant on demurrer in *quare impedit*, and *Le Blanc*, Serjt. now moved on the part of the plaintiff, that the prothonotary might be restrained from taxing costs to the defendant; he argued that as the plaintiff would not have been intitled to costs if he had succeeded, neither was the defendant, the right being mutual. The statute of *Gloucester* (*b*) gave costs only where damages were recoverable at common law, but as there were no damages at common law in *quare impedit*, costs were not given by that statute. So also where double or treble damages were created, costs were not increased by that statute in the same proportion, unless in cases where single damages might have been recovered at common law. 2 *Inst.* 289. And though the stat. *Wylmester* 2 (*c*) gave damages in *quare impedit* and *darrein presentment*, yet as those damages did not accrue at common law, the stat. *Gloucester* did not operate to give costs in those actions, 2 *Inst.* 362. *Pilfold's* case, 10 *Co.* 116. *a.* (*d*) The only ground then on which

(*a*) [*Foster*; see *ante*, pa. 376.]

(*b*) 6 *Ed.* 1. c. 1.

(*c*) 13 *Ed.* 1. *ff.* 1.

(*d*) [But see 1 *Term* R. p. B. R. 72, 73. and the cases there cited.]

the defendant can rest his claim to costs, is the 8 & 9, *Will. c. 11.* But this statute, though the words of it are general, cannot now be construed so as to entitle the defendant to make good his claim, against the authority of adjudged cases. In *Lomax v. The Bishop of London*, *Barnes*, 139. (a) it was holden that the plaintiff in a *quare impedit* (brought for the same advowson by the same family as in the present case) had no right to costs; and the case of *The King v. Midlam*, 3 *Burr.* 1720. shews the right to be reciprocal. *Formedon* is, in this respect, in the same situation as *quare impedit* (no damages being recoverable in it at common law, it does not fall within the statute of *Gloucester*); and in *Formedon* costs are not allowed. *Miller v. Seagrave*, *Cooke Pract.* 25. which case, being subsequent in point of time, and fully considered, is sufficient to over-rule the short anonymous note in *Cooke's Pract.* 4. where it is said that the defendant in *quare impedit* shall have costs on demurrer. It is also of great weight, that no instance can be produced in the course of modern practice, where costs have been in fact allowed in this action.

Bond, Serjt. *contra*. The defendant having prevailed in the suit, and had a writ to the Bishop, is entitled to the costs of that suit. The stat. 8 & 9 *W. 3. c. 11.* is general in its meaning and expressions, and includes *quare impedit* with other actions; by mentioning "*demandant and tenant*," it seems evidently designed to extend to real as well as personal actions. With respect to *Cooke's Pract.* 4. there is no reason why the anonymous case of *quare impedit* there stated, which is expressly in favour of the present defendant, should be invalidated by the subsequent determination in *formedon*.

Cur. vult advis.

LORD LOUGHBOROUGH.—After having taken the construction of the stat. 8 & 9 *W. 3. c. 11.* and the cases cited into full consideration, we are of opinion that the defendant is not intitled to costs on the demurrer. Soon after the passing that statute, namely in the 10th year of King *William*, the case of *Thomas v. Lloyd* was decided in the King's Bench, which is reported 1 *Salk.* 194. and 1 *Lord Raym.* 336. (b) in which, on a plea of privilege by the defendant which was holden good on demurrer, it was contended that he was intitled to costs in consequence of the judgment, but the determination of the court was, that costs were only given by the statute where the right was reci-

(a) Last edition.

(b) S. C. *Comberb.* 482. 12 *Mod.* 195.

1790. **THRALE v. The Bishop of LONDON.** procal between plaintiff and defendant. In the second year of Queen *Anne* the same question came before the court of King's Bench in the case of *(a) Garland v. Extend* on a plea in abatement, and costs were again refused. After these cases came the anonymous *(b)* case in this court, where it is stated that the defendant was holden to be intitled to costs. But in the tenth year of *George 1.* the case of *Miller v. Seogrove*, *Cooke Prac.* 25. underwent repeated argument and consideration, and though one of the judges differed, at first, from the rest of the court, yet it was afterwards solemnly resolved that no costs should be allowed. The construction which was put on the statute in that case we think the true one, that the costs given by it are confined to cases where the plaintiff as well as defendant is intitled to them.

Rule absolute.

(a) 1 Salk. 194. 2 Ld. Raym. 992.

(b) Cooke's Cas. Prac. 4.

Monday,
Nov. 29th.

Where judgment is signed against a defendant in an inferior court of record, and he surrenders in discharge of his bail, but before he is charged in execution, is removed to the Fleet by *habeas corpus*, the court will grant a *certiorari* to remove the record in order to charge him in execution in the Fleet, by virtue of the stat. 19 Geo. 3. c. 70. s. 4.

JORDAN v. COLE.

JUDGMENT being signed against the defendant in the court of the mayor of London, he surrendered himself to the Poultry Compter, on the 19th of May last in discharge of his bail. In the 24th of July a *ca. sa.* issued out of that court to charge him in execution, but he had been previously removed by *habeas corpus* to the Fleet Prison on the 7th of June. And in this term Lawrence, Serjt. obtained a rule to shew cause, why a *certiorari* should not issue to the mayor's court to remove the record of the judgment into this court, in order to charge the defendant in execution on it in the Fleet, by virtue of stat. 19 Geo. 3. c. 70. s. 4. (a) The only doubt was on the con-

struction

(a) Which is as follows—"And forasmuch as persons served with process issuing out of inferior courts, where the debt is under ten pounds, may in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such courts, be it enacted by the authority aforesaid, that in all cases where such judgment shall be obtained in any action or suit, in any inferior court of record, it shall and may be lawful to and for any of his majesty's courts of record at Westminster, upon affidavits made and filed therein of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her or their effects, and of execution having issued against the person or persons, or effects, as the case may be, of the defendant or defendants, and that the person or persons, or effects of the defendant or defendants, are not to be found in the jurisdiction of such inferior court, (which affidavit may be made before a judge

struction of the statute, which does not in express terms extend to the case of a prisoner in actual custody. But the court thought that the case was within the equity of the statute, and therefore made the

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v.
COLL.

Rule absolute.

And the defendant being afterwards brought up was committed in execution.

“ or commissioner authorized to take affidavits and such superior court) to cause the
“ record of the said judgment to be removed into such superior court, to issue writs of
“ execution thereupon to the sheriff of any county, city, liberty or place, against the
“ person or persons, or effects of the defendant or defendants, in the same manner as upon
“ judgments obtained in the said courts at Westminster: And the sheriff upon every such
“ execution shall, and he is hereby authorized to detain the defendant or defendants until the
“ sum of twenty shillings be paid to him, or to levy the same out of the effects,
“ according to the nature of the execution, for the extraordinary costs of the plaintiff
“ or plaintiffs in the inferior court, subsequent to the said judgment, and of the execu-
“ tion in the superior court, over and above the money for which such execution shall
“ be issued.”

ABBEY v. MARTIN.

M. 21st,
Nov. 29th.

THE defendant being arrested on a *capias ad resp.* gave bail in the usual manner to the sheriff, but not having perfected bail to the action in due time, the bail bond was assigned, and process issued against the bail returnable on the *last return of Trinity term*, viz. in three weeks of the Holy Trinity, with copies of which they were duly served. On the 23d of June, the last day of Trinity term, a declaration was filed *de bene esse* until an appearance should be entered, and notice given to plead within the first four days of Michaelmas term. No appearance being entered on the 26th of October following, on that day the plaintiff entered appearances according to the statute, gave rules to plead on the first day of Michaelmas term November the 6th, and on the 10th of November signed judgment for want of a plea.

Where pro-
cess is re-
turnable on
the last return
of a term, a
declaration
de bene esse
may be filed
with notice
to plead
within the
four first
days of the
next term.

In consequence of this Cockell, Serjt. obtained a rule to shew cause why all the proceedings should not be set aside, on the ground that no declaration could be filed *de bene esse* where the writ was returnable on the last return of a term, the rule 8 Geo. 3. expressing only the first, second, and third returns. But The Court, after consulting the secondaries, held the proceedings to be regular, due notice being given to plead in the present term.

Rule discharged (a).

(a) Barnes, 342. Fosterby v. Lloyd. Impey New Instr. Cler. G. B. 199. 201.

1790.

Monday,
Nov. 29th.

HOOPER v. HARCOURT.

After verdict the court will not compel an attorney to discover the place of abode of his client.

THE defendant in this action (which was for the penalty of the statute (a) for exposing a hare to sale) having gained a verdict at the last assizes at *Hereford*, on the motion of *Marshall*, Serjt. a rule was granted to shew cause why the plaintiff's attorney should not inform the defendant's attorney of the place of abode of the plaintiff, on an affidavit of the defendant's attorney stating that the plaintiff's attorney had declared at the assizes that the plaintiff was in very indigent circumstances, and that he (the attorney) was employed by one *Major Roberts. Watson*, Serjt. shewed cause by producing an affidavit of the plaintiff's attorney, denying that he was acquainted with the place of abode of the plaintiff.

The Court were of opinion that the application ought to have been made in a more early stage of the cause, and came too late after verdict, an attorney not being obliged to expose his client to be taken in execution.

Rule discharged (b).

(a) 5 Ann. c. 14. & vide 23 Geo. 2. c. 12.

(b) 1 Stra. 402. *Gynn v. Kirby*. *Burnes*, 126. *Skindler v. Roberts*.

THE END OF MICHAELMAS TERM,

C A S E S

ARGUED AND DETERMINED

1791.

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Thirty-first Year of the Reign of GEORGE III.

DOE on the several Demises of MATTHEW ROBERTS *Thursday,*
and MARY his Wife, and of the said MATTHEW *February 3d.*
ROBERTS v. ELIZABETH POLGREAN.

THIS was an ejectment brought to recover a leasehold tene-
ment part of an estate called *Lower Lariggan* in the parish
of *Maddern* in the county of *Cornwall*. At the trial of the
cause before Mr. Justice *Heath*, at the last assizes for that county,
a verdict was found for the plaintiff, subject to the opinion of
the court on the following case:

John Honeychurch the elder, of higher *Lariggan* in the parish
of *Maddern*, being possessed of the premises in question for the
residue of a term of nine hundred and ninety-nine years then
unexpired, by his will bearing date the 20th of *May* 1720,
devised the said premises to trustees, from and immediately after
his decease, for and during all the rest, residue and remainder
to come and unexpired of the said term, in trust for his wife
Elizabeth Honeychurch for her life, and after her decease, then
in trust for his daughter *Mary Rawles*, the wife of *William*
Rawles, for her life, and after her decease, then in trust for his
grandson *William Rawles*, son of the said *William* and *Mary*

A. survived *B.* and died without issue, intestate, and without having taken out administration to *B.*
his wife. The term upon the death of *A.* went to his administrator, and not to the administrator of
B. [the court being of opinion that the deed must be construed as a present gift to the wife in case
she survived her husband, to take effect in possession on that event.]

A. being
possessed of
lands for a
term of 999
years, pre-
vious to his
marriage
with *B.*
granted the
term to "*B.*
" and her
" heirs imme-
" diately af-
" ter the
" death of *A.*
" to hold the
" same to
" the said *B.*
" and her
" heirs to
" and for her
" and their
" own pro-
" per use for
" ever;" the
marriage
took effect,

Rawles,

1791. *Rawles, and the issue of his body lawfully begotten, and after his decease without issue, then in trust for the 2d, 3d, 4th, 5th, and all and every other son and sons by the said William Rawles, on the body of the said Mary Rawles lawfully to be begotten, severally, successively, and in remainder one after another, as they should be in seniority of age and priority of birth, &c. and for want of such issue, then in trust in like manner for all and every the daughter and daughters by the said William Rawles on the body of the said Mary Rawles lawfully to be begotten and their issue, &c. with remainder over.*

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grean.

Afterwards the said *John Honeychurch* on the 11th of *August* 1724, by indenture of that date made between the said *John Honeychurch* of the one part, and *Mary Rawles* widow and daughter of the said *John Honeychurch* of the other part, granted and assigned unto the said *Mary Rawles* immediately after the death of the said *John Honeychurch* and *Elizabeth Honeychurch*, his then wife, and not before, all the before-mentioned premises, To hold the same unto the said *Mary Rawles*, during her natural life, with remainder to her son *William Rawles* and his issue lawfully begotten, and in default of issue of the said *William Rawles*, then to *Elizabeth Rawles* now *Elizabeth Polgrean* (the defendant) daughter of the said *Mary Rawles* during her natural life, with remainder over. *John Honeychurch* afterwards died, whereupon the said *Mary Rawles* his daughter possessed herself of the premises in question, and on the 24th day of *April* 1749, the said *Mary Rawles* having then survived her mother *Elizabeth Honeychurch*, by indenture of that date assigned and set over to her son *William Rawles*, his executors and administrators the said premises during the remainder of the said term. Afterwards on the 29th *April* 1749, by indenture of that date, made between the said *William Rawles* of the first part, *Margery Cole* widow of the second part, and *John Highman* of the third part, reciting that a marriage had been agreed upon between the said *William Rawles* and *Margery Cole*, the said *William Rawles* for and in consideration of natural love and affection, did give, grant, assign, and make over “unto the said *Margery Cole* and her heirs immediately after the death of him the said *William Rawles*, all the premises therein before mentioned, to hold the same unto the said *Margery Cole* and her heirs to and for her and their own proper use for ever.” The marriage between *William Rawles* and *Margery Cole* took effect, *William Rawles* survived his wife, and afterwards died without issue living at the time of his death, intestate, and administration of

of his rights and credits was in due form of law granted to the defendant *Elizabeth Polgrean*. *Mary Roberts* the lessor of the plaintiff the wife of *Matthew Roberts*, the other lessor of the plaintiff, was the daughter of *Murgery Cole* (afterwards *Margery Rawles*,) by a former husband, and administration of all her goods, rights, and credits, was granted to the said *Mary Roberts*.

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GREAN.

Rooke, Serjt. for the lessors of the plaintiff. This question arises between the sister of *William Rawles* who was possessed of the term, and the daughter of his wife by a former husband. What the general equity of the case is cannot be doubted. *William Rawles* being about to marry a widow and to possess himself of all her personal property, agrees previous to the marriage, to settle the term on her and her family, as a provision for them after his decease. It was clearly his intention that her family should be benefited in preference to his own; which was a fair and reasonable intention, he having by the marriage become possessed of all his wife's personal property. The intention then of the parties is in favour of the lessors of the plaintiff. It is also clear that *William Rawles* had a right to make the settlement. A term for years given generally, is given absolutely. Here the term was given to *William Rawles* and his issue; this was an absolute disposition of the whole. Having therefore exerted this right, and given the term to his wife after his death, her interest in contemplation of law was a mere possibility. A legal possibility has no existence till a certain event takes place. It differs from a contingency, inasmuch as in the latter an interest exists, though it depends upon some future circumstance whether that interest shall take effect in possession. This agrees with the logical distinction between a possibility and a contingency; a possibility being defined to be, that which has no actual existence till a future event shall happen; a contingency, that which has a present existence, but which may or may not happen to take effect. Terms for years however long, were in their origin of so precarious a nature as to the continuance of the tenure, that in contemplation of law if they are granted over by deed after an estate for life in them, such an expectant interest is not a vested right, but a mere possibility. 4 Co. 66. b. *Fulwood's* case, 8 Co. 95. a. *Matt. Manning's* case, 1 Cas. in Canc. 131, *Wood v. Sanders*, *Sir William Jones*, 416. *Bery v. Burlace*. The question then is, What right the husband has over a mere possibility settled on the wife? It is clearly to be distinguished from
a vested

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kran.

a vested interest. If a chattel real is vested in the husband in right of his wife, he may dispose of it during the coverture; he shall have it if he survive her without taking out administration, because it has once vested in him. *Plowd.* 192. *Co. Litt.* 46. b. 1 *Roll. Abr.* 345. *H. pl.* 8. So if the husband die before the wife, she shall not again be possessed of what she has once disposed of; as if he has leased the whole chattel interest, the rent shall go to his executors and not to the wife. He may forfeit it. 1 *Roll. Abr.* 344. *G. pl.* 2. It may be extended for his debt. *Ibid.* *pl.* 3. So outlawry and attainder are gifts in law. *Co. Litt.* 351. a. But if he grant only part of the term and die, the wife shall have the residue, because the husband who had it in her right did not dispose of it. *Co. Litt.* 46. b. 1 *Roll. Abr.* 345. *G. pl.* 10. *Perk.* 834. If she survive and the husband has not disposed of it, she shall have it again. He cannot charge it, *Co. Litt.* 351. a. nor can he devise it, *Ibid.* It is clear therefore that the husband shall have a chattel real if he is once possessed in right of his wife; and his executors shall have the rent if he once disposes of it. But it is equally clear that if it never vests in him (which a possibility has been shewn not to do) he acquires no power over it, nor can he dispose of it. He cannot assign it, *Lampet's case*, 10 *Co.* 51. a. nor release it, *Salk.* 326. *Gage v. Acton*, in which case the words of Lord Holt are exceedingly strong. "Where the wife hath any right or duty which by possibility may happen or accrue during the coverture, the husband may by release discharge it, but where the wife hath a right or duty, which by by no possibility can accrue to her during the coverture, the husband cannot release it." If he does not dispose of it, it goes to the executor of the wife in case she should die first, and does not survive to the husband or his representatives. The words of Lord Coke are decisive of the question. "If a lease be made to a baron and feme for term of their lives, the remainder to the executors of the survivor of them, the husband grants away this term and dieth, this shall not bar the wife, for that the wife had but a possibility and no interest." *Co. Litt.* 46. b. And "if a feme sole be possessed of a chattel real, and be thereof dispossessed, and then taketh husband, and the wife dieth and the husband survive, this right is not given to the husband by the intermarriage, but the executors or administrators of the wife shall have it; for it is if the wife have but a possibility." *Co. Litt.* 351. a. A trust for the wife does not vest in the husband: he shall not have it

as husband if he survive the wife. 1 *Roll. Abr.* 345. pl. 13. 1791.
 Though he may dispose of a trust in equity. 1 *Eq. Caf. Abr.* 58.
 A right of action or of entry in right of the wife, not exercised by the husband in her life-time, does not survive to him. A possibility cannot vest in the husband or in any other person, till the event takes place on which it depends; he has therefore no power over it, prior to that event. *Co. Lit.* 351. a. If then the husband has no power over it, if it does not vest in him, he cannot have it in his marital character if he survive, but ought to take out administration. In the present case, as the husband did not take out administration, the interest in the term could not go to his representatives, but is vested in the administratrix of the wife, the lessor of the plaintiff. But it may be objected that the administratrix is a mere trustee, and therefore ought not to bring the ejectment. But an administrator has a legal interest while the administration remains unimpeached, and in a case like the present (of a married woman who dies before her husband, but to whom he does not take out administration,) is liable to her debts contracted before the coverture, from which the husband is discharged unless they were sued for during the life-time of the wife. 1 *Roll. Abr.* 351. G. pl. 2. The court will not presume that there are no debts, nor create a trust by implication against the intent of the parties. That intent obviously was that the family of *Margery Cole* should be benefited rather than that of *William Rawles*. And it would be dangerous to say, that an administrator could not maintain an ejectment against the next of kin without giving an account of debts and assets. In the case of a clear trust, it is not settled that a trustee may not support an ejectment (a). But in the case of a mere constructive trust (which this is) depending on equitable circumstances, courts of law will leave the law to take its course, and the parties to apply to equity, if necessary, on the special circumstances of their case.

Lawrence, Serjt. for the defendant. There are two points in this case, either of which is sufficient to intitle the defendant: the first, that she may take in her own right under the former deed, the limitation to her not being too remote; the second, that she may take as administratrix of her brother *William Rawles*. With respect to the first point, the limitation is "to *William Rawles* and his issue lawfully begotten, and in default of issue in the said *William Rawles*, then to *Elizabeth Rawles* (the now defendant) during her natural life." Now

(a) See *Doe v. Post*, 2 *Drugl.* 721. 870, and the cases there cited in a note.

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the limitation of a term is governed by the same rules as an executory devise. If it be on a general indefinite failure of issue, it is clearly bad; but if the failure of issue be confined to the compass of one or more lives in being, it is good. Here the term is given, on failure of issue in *William Rawles*, to *Elizabeth Rawles during her natural life*; the failure therefore of issue is restrained to the period of her life. That such a limitation is valid, appears from the Duke of *Norfolk's* case, 3 *Cas. Chan.* 1 *P. Wms.* 432. *Target v. Gaunt.* *Ib.* 534. *Hughes v. Sayer.* *Ib.* 564. *Pinbury v. Elkin.* *Prec. Chan.* 528. *Nichols v. Skinner.* *Salk.* 225. *Lamb v. Archer.* As therefore *William Rawles* died without issue in the life-time of *Elizabeth Rawles*, (now *Polgrean* the defendant,) she was intitled to the term in her own right. But, secondly, she is intitled as administratrix of her brother. It is argued, that this interest was but a possibility, which did not vest in the husband, and of which he could not dispose. But in truth it was not a possibility, unless it can be supposed that he would survive a period of 999 years. That such sort of remainders are considered as vested, appears from *Hutt.* 118. *Napper v. Saunders*, and *Pollexf.* 24. *Weale v. Lower*, in which last Lord *Hale* held that "if a feoffment be made to the use of *A.* for 99 years, if he should so long live, and after his death to the use of *B.* in fee, this shall not be contingent, but it shall be presumed that his life will not exceed 99 years; but otherwise it would have been if it had been made but for 21 years;" this affords an answer to *Lampet's* case, 10 *Co.* 51. *a.* where it is stated, that "a man made a lease to husband and wife for 21 years, the remainder to the survivor of them for 21 years, and the husband granted over this term; and it was held by *Wray* Chief Justice, and *totam curiam*, that the grant was void for the uncertainty of the person; for although all chattels real which belong to the wife the husband may dispose of, yet in this case neither the husband nor wife has any thing till the survivor." In whatever light this subject was considered in the older cases, the law of executory interest is now more clearly settled, it being holden that they were assignable, transmissible, and descendible (*a*). The court were of opinion that the deed in question, though inaccurately drawn, must be construed to be a present gift to the wife in case she survived her husband, to take effect in possession on that event. The right to the term therefore was in the husband, and passed to his representative:

Judgment for the defendant.

(*a*) *Vide ante*, 30. *Roe v. Jones*, affirmed by the court of *B. R.* in error. 3 *Term Rep.* *B. R.* 88.

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MEYER v. RING.

Monday,
Feb. 7th.

THE venue was laid in *London*, and the plaintiff gained a verdict at *Guildhall*, at the sittings in this term. On the first of *February* costs were taxed on the *postea*, and the next day a *fi. fa.* taken out, into *Middlesex*, instead of *London*, as it ought to have been. In consequence of this a rule was granted on the 4th of *February*, to shew cause why the execution should not be set aside, and the goods levied in *Middlesex* restored to the defendant. On notice of this motion, the plaintiff's attorney on the same day sued out a *fi. fa.* into *London*, got a return of *nulla bona* entered on the roll, and on the 5th of *February* obtained a rule for the defendant to shew cause why the *fi. fa.* which had first issued into *Middlesex* should not be amended, by inserting in it the return of *nulla bona*, and the *testatum* clause (a).

Where a *fi. fa.* is sued out into a different county from that in which the venue is laid, and the party suing it afterwards takes out a *fi. fa.* into the proper county, and gets a return of *nulla bona* in order to warrant the *fi. fa.* which first issued, the court will permit the first writ to be amended by inserting the return of *nulla bona* and the *testatum* clause, though the second writ be returnable several days before the

Cockell, Serjt. now shewed for cause against the amendment, that the *fi. fa.* which the plaintiff had sued out into *London* in order to do away the irregularity, was returnable in 15 days of *St. Hilary*, *January* 27, which was five days before that on which judgment was signed, viz. *February* 1.

But the court said, that as judgments relate to the first day of the term, (except in the case of *bonâ fide* purchasers for a valuable consideration (b),) it was proper to make the

Rule absolute for the amendment (c).

judgment was signed; because judgments relate to the first day of the term.

(a) *Vide Impey, New Inst. Cler. C. B.* 3d ed. 453.

(b) *Stat. 29 Car. 2. c. 3. s. 15.*

(c) [See *Couperthwaite v. Owen*, 3 *Term Rep. B. R.* 657. and *Skew v. Maxwell*, 6 *Term Rep. B. R.* 450.]

LONGMAN and another v. FENN.

Wednesday,
Feb. 9th.

ASSUMPSIT on a promissory note. Plea, a former judgment recovered in *B. R.* Replication, *nul tiel record*, and issue thereon. Judgment by default against the defendant in not producing the record.

Where there is judgment by default on a promissory note, the court will refer it to the prothonotary to ascertain the

On the motion of *Marshall*, Serjt. a rule was granted to shew cause why it should not be referred to one of the prothonotaries

damages and costs without a writ of inquiry.

1791. to ascertain the principal, interest and costs due to the plaintiff, without a writ of enquiry.

LONGMAN
v.
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Rooke, Serjt. shewed cause, arguing that though the court had in some cases a right to make the reference required, yet that right ought to be confined to actions of debt, where a specific sum was demanded: that it was the peculiar province of a jury to determine the quantum of damages arising from a breach of contract, and the fact whether any, and how much, interest were due: that the revenue would be greatly injured if the motion were allowed, inasmuch as it tended materially to the diminution of the stamp-acts: that if this practice had prevailed, or if the Legislature had supposed it would prevail, when those acts were passed, provisions would have been made to meet it; but that it was never conceived that the taxation of costs, in actions on simple contracts, would supersede the necessity of a writ of inquiry.

But the court said, that as the practice was clear in actions of debt (a), there seemed to be no good reason why it should not also prevail in those actions of *assumpsit* where the demand was precisely ascertained. In 3 *Wilf.* 62. on a judgment by default in trespass, *Wilmot*, Ch. J. had gone so far as to hold, that the court might, if they pleased, themselves assess damages (b). In the present case, if there were any fact which it was necessary for a jury to determine, it ought to have been stated by affidavit. But as no such fact appeared, as the sum was defined on the face of the note, and as the interest was capable of exact computation by the prothonotary, it was highly reasonable to save the parties the expence of a writ of inquiry.

HEATH, J. mentioned 3 *Leon.* 213. where the plaintiff in replevin was nonsuited, it was holden that the court might assess damages without a writ of inquiry, "because they are not in respect of any local matter, but accrued to the avowant for the delay in the non-payment of the rent: contrary, where judgment is given for the plaintiff, there the court shall not assess damages, for he ought to recover for the taking of his cattle, of which the judges cannot take notice, and the damages may be greater or less, according to the value of

(a) 2 *Saund.* 176 *Holdipp v. Orway.*

(b) On which point see Year Books 14 *Hen.* 4. 9. 3 *Hen.* 6. 29. 19 *Hen.* 6. 10. 1 *Roll. Abr.* 573. *Trin.* 172. *Goodwin v. Welffe*, 1 *Brownl.* 214. S. C. and 2 *Wlf.* 373. *Hewit and others v. Mantell.*

"the cattle and the circumstances of taking and delaying 1791.
"them."

Rule absolute (a).

LONGMAN
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FENN.

(e) In *Mallory v. Jennings, Fitzgib.* 162. there was judgment by default in *assumpsit* in C. B. and error being brought, it was insisted upon that there was no writ of inquiry, and therefore that damages were assessed by persons whom the sheriff had no authority to convene. But the court of B. R. held that the omission of the writ of inquiry was cured by the statute for the amendment of the law. (4 Ann. c. 16. s. 2.) In *Thelsson v. Fletcher, Dougl.* 315. in an action on a policy of insurance on a foreign ship, where there was a stipulation that the policy should be sufficient proof of interest in case of a loss, and judgment by default, it was holden that on the writ of inquiry, the defendant's subscription was the only thing necessary to be proved. There *Buller, J.* observed that "writs of inquiry were often sued out *where they were not necessary*, as for instance, in "actions of covenant for the non-payment of a sum certain. It does not follow, because "a writ of inquiry has been awarded, that the amount of the demand is uncertain. In "actions upon a bill of exchange or promissory note, *nothing but the instrument is to be "proved before the jury, the sum being thereby ascertained.* Though even in cases "where there is *no necessity* for a writ of inquiry, that proceeding is of use, when the "plaintiff goes for interest, which the jury assesses in the nature of damages." By a subsequent determination, *Green v. Hearne, 3 Term Rep. B. R.* 301. it is laid down, that on judgment by default against the acceptor of a bill of exchange, on executing it is to see whether any part of it has been paid; which agrees with a *Sira.* 1145. *Bevis v. Lindsell.* See also *Rapleigh v. Salmon, ante, 252.* [and the note there] and *Andrews v. Blake, ante, 529.*

The KING on the Prosecution of BOND, Esquire, v. Friday,
BAKER and NEWMAN, Esquires, late Sheriff of Feb. 11th.
MIDDLESEX.

THE proceedings in this case were as follows:—On the 14th of May 1790, a *fi. fa.* was delivered to the sheriff of Middlesex, on a judgment confessed on a warrant of attorney by one Purcell to one Anne Dempsey for 200 l. and upwards, by virtue of which the whole of Purcell's effects were taken in execution. On the 15th of the same month another *fi. fa.* was delivered to

A *fi. fa.* issued to the sheriff at the suit of A. against B. on the next day, another *fi. fa.* issued at the suit of C. against B. a levy was made under the first writ, but notice was given to the sheriff by C. not to pay over the money to A. on the ground that the judgment obtained by him was fraudulent. The sheriff notwithstanding paid the money over to A. and the officer filed the second writ with a return of *nulla bona* in the King's Bench treasury, instead of the office of the Custos Brevium of this court. On this an attachment issued against the sheriff for not returning that writ, to which attachment (after moving the court to discharge it, on the ground that the writ in question was filed in the wrong place by mere mistake of the officer, and that the mistake was corrected immediately on notice of the attachment, by filing it in the proper office, but with which motion the court refused to comply, chiefly on account of strong circumstances of fraud respecting the execution at the suit of A.) the sheriff put in bail, and was afterwards examined on interrogatories. The prothonotary, to whom the examination was referred, having reported that neither the contempt of the court, nor the imputation of fraud appeared to him to be done away, the court ordered the sheriff immediately to pay the whole debt and costs due to C. together with the costs of all the applications.

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the sheriff, on a judgment confessed on a warrant of attorney by the same *Purcell* to *Bond* the prosecutor, for 141 l. 8 s. and upwards; which last warrant was given for a *bonâ fide* debt by *Purcell* to *Bond* and long before that which *Purcell* gave to *Anne Dempsey*, though judgment on the latter was first entered up. On the 27th of *May* notice was given by *Bond* to the sheriff not to pay over the money which might be levied under the first execution, stating that the judgment obtained by *Dempsey* was voluntary, confessed without any consideration, and merely for the purpose of preventing the effect of the judgment confessed to *Bond*. Notwithstanding this notice, the sheriff's officer paid over the money to *Dempsey*, and the sheriff being ruled to return the second *fi. fa.* the officer filed it with a return of *nulla bona* in the King's Bench treasury, instead of the office of the Custos Brevium of this court. In consequence of this, an attachment of contempt issued against the sheriff. Immediately on notice of the attachment, the officer filed the writ and return in the office of the Custos Brevium, and offered to pay the costs of the attachment, which the plaintiff's attorney refused to accept. Late in *Trinity* term a rule was obtained on the part of the sheriff to shew cause, why the attachment should not be set aside on payment of costs, upon an affidavit stating that the writ and return were filed in the wrong office by mere mistake. On shewing cause the last day of *Trinity* term, strong circumstances of fraud were disclosed relating to the first execution at the suit of *Dempsey*, upon which the rule was discharged with costs. In the ensuing vacation the sheriff obtained Lord *Loughborough's* order to stay the execution of the attachment until the second day of *Michaelmas* term, the object of which was to give the sheriff an opportunity of answering the allegations of fraud. On the first day of *Michaelmas* term a motion was again made to set aside the attachment, on affidavits of the sheriff's officer denying any knowledge of fraud, and stating, as before, that the writ and return were filed in the wrong office by mere mistake; but to this motion the court again refused to consent, the affidavits of the officer not being satisfactory. Upon this, the sheriff obtained a rule that the attachment should remain in the office one week longer unexecuted, and on the 10th of *January* put in bail to the attachment, who on the 13th, on the usual affidavit of the service of notice, justified themselves in court.

In the following vacation, interrogatories were exhibited to the sheriff, which, together with the answers, were referred to the

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the prothonotary, in order for him to make his report. Accordingly, in this term, on the 10th of *February*, *Mr. Prothonotary Mainwaring* reported to the court, that the High Sheriff had in their answers (as of course) denied all knowledge of the circumstances stated in the interrogatories, and upon due examination nothing appeared to him to lessen the imputation of fraud upon the execution sued out by *Dempsey*, or to clear the contempt of which the officer had been guilty in not making a proper return of the writ.

Adair, Serjt. then moved, that the sheriff who were both in court, should be committed to the Fleet prison, till the debt and costs recovered on the second judgment by the plaintiff *Bond*, together with the costs of all the applications, should be paid by them. In answer to this, *Bond*. Serjt. contended that the court had no power to imprison the sheriff in such a case as this, that the regular method of proceeding was to amerce them for the contempt, that the amercement should be estreated into the Exchequer, and then the plaintiff ought to apply to the Crown for satisfaction of his debt out of the amercement; to establish which proposition he cited *Laycock's case*, *Latch*, 187. *Dalton Office of Sheriff*, 176. and *Woodgate v. Knatchbull*, 2 Term Rep. B. R. 148. (a) and to shew that the court ought not to impose a fine on the sheriff, to the whole amount of the debt, but ascertained by the intervention of a jury what were the actual damages sustained, he mentioned the opinion of *Buller*, J. thrown out in *Dougl.* 464. (b) *Rex v. Adderley*.

The court said, that if the practice now the subject of complaint, were to prevail, there would be numberless opportunities afforded for fraud and collusion, and persons who had recovered a just debt would be, in great measure, in the power of sheriffs' officers. It would be absurd to drive the plaintiff to the circuitous mode of application to the Crown for relief, after an estreat into the Exchequer, when they were themselves fully competent to afford him satisfaction. However they would permit the matter to stand over to the next day, in order to see if any thing further could be alleged to do away the suspicion of fraud in the execution at the suit of *Dempsey*. On the next day, *February* 10th, no attempt was made to prove the validity of the judgment and execution obtained by *Dempsey*; but *Bond*, Serjt. proposed that the plaintiff should bring an action for a false return, the sheriff pay all the costs of the applications,

(a) See also *Salk.* 54. *Eyres v. Smith*.

(b) 3d edit. 1750, 8vo.

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and in the mean time the attachment stand as a security. But the court refused to consent to this, and ordered that the *sheriff should immediately, without further delay, pay the whole debt and costs due to the plaintiff Bond, together with the costs of all the applications (a)*, there was no hardship, it was said, on the sheriff themselves in this, as they were indemnified. With respect to the question of imprisonment, the court said in general, there could be no doubt of their power to commit for a contempt.

Upon hearing this, the sheriff thought proper to comply with the terms prescribed, and accordingly soon after paid the whole debt and costs, and the costs of all the applications.

(a) The rule for this purpose was drawn up on the same day in the following words: " Let the sheriff pay this day the debt and all the plaintiff's costs in the cause and in this prosecution, to be taxed by the prothonotary, or in default thereof a fresh attachment to issue against the late sheriff, and their recognizance of bail to be exhibited."

By the court.

Friday,
Feb. 11th.

BALLS *qui tam* v. ATWOOD, Clerk.

In an action of debt for non-residence on 21 Hen. 8. c. 13. an affidavit that the offence was committed in the county where, and a year before, the action is brought, is not necessary, the stat. 21 Jac. 1. c. 4. f. 3. not being applicable to such action.

A Declaration having been delivered in this action of debt on the statute 21 Hen. 8. c. 13. (a) for non-residence, *Adair*, Serjt. obtained a rule to shew cause why all the proceedings should not be set aside, on the ground that upon searching in the office no affidavit appeared to be filed that the offence was committed in the county where, and within a year before, the action was brought; which he contended was made necessary in actions of this kind by stat. 21 Jac. 1. c. 4. f. 3.

Le Blanc, Serjt. shewed cause, arguing that the stat. 21 Jac. 1. c. 4. could not possibly be applied to this case, because by 21 Hen. 8. c. 13. f. 26. the penalty for non-residence was to be recovered in the *King's*, i. e. the superior courts. The authority of *Leigh qui tam v. Kent*, 3 Term Rep. B. R. 362. was directly in point; and decisive of the question; there the court of *King's Bench* over-ruled a former case of *White qui tam v. Boot* (b), and held that no such affidavit was necessary: this indeed was after verdict, but the court of B. R. laid it down as a general proposition, that the stat. 21 Jac. 1. c. 4. was not applicable to those

(a) S. 26.

(b) 2 Term Rep. B. R. 274.

statutes on which penal actions were to be brought in the superior courts. 1791.

This court were clearly of this opinion, and

Discharged the rule. BALLS
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RUDDER v. PRICE, One, &c.

*Saturday,
Feb. 12th.*

THIS was an action of debt on a promissory note payable by instalments, brought in a former term by the payee against an attorney the maker, by bill of privilege. The first count, on which the question before the court arose, after stating the debt to be 452 *l.* 10 *s.* which the defendant owed to and unjustly detained from the plaintiff, went on, "For that whereas the said *Stephen*, on the 30th day of *March*, in the year of our Lord 1790, to wit, at *Westminster* in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand and name being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *Richard*, by which said note the said *Stephen* promised to pay to the said *Richard*, by the name of Mr. *Richard Rudder* or order, fifty-two pounds ten shillings, for value received by him the said *Stephen*, the same to be paid in manner following, (that is to say,) twenty pounds on the first day of *July* then next, twenty pounds on the first day of *October* then next, and twelve pounds ten shillings on the first day of *January* next, by reason whereof and by force of the statute in such case made and provided, the said *Stephen* became liable to pay to the said *Richard* the said sum of money in the said note specified, according to the tenor and effect of the said note, whereby an action hath accrued to the said *Richard* to demand and have of and from the said *Stephen*, the said sum of money in the said note mentioned, parcel of the said sum of four hundred and fifty-two pounds ten shillings above demanded," &c. There were also the common money counts for the residue of the sum of 452 *l.* 10 *s.* above demanded.

Special demurrer to the first count, the causes of which were, "That in and by the said first count of the said declaration it appears that the said sum of 52 *l.* 10 *s.* in the said notes mentioned is not yet due or payable, nor can the same be sued for by the said *Richard Rudder* till after the first day of *January*,

N n 3

" in

An action of debt will not lie on a promissory note payable by instalments, till the last day of payment the past.

1791. " in the year of our Lord 1791, and also for that no cause of
 " action whatsoever is in the said first count of the said declara-
 RUDDER " tion stated or alleged against the said *Stephen*," &c. To the
 PRICE. other counts the defendant pleaded *nil debet*, on which issue was
 joined.

In *Michaelmas* term, in support of the demurrer, *Lawrence*,
 Serjt. contended that the law was clearly settled, that an action
 of debt could not be maintained on a contract to pay money by
 instalments on different days, before the last day was expired,
 whether the contract were simple or by specialty. For which
 he cited the following authorities: *Fitz N. B.* 304. (a) *Ca.*
Litt. 47. b. & 292. b. 4 *Co.* 94. b. *Slade's case.* *Cro. Eliz.*
 807. *Cro. Car.* 241. *Owen*, 42. And though in 1 *Wils.* 80.
Coates v. Hewitt, an action of debt on a bond conditioned for the
 payment of money by instalments was holden to lie before the
 last day, yet the court in that case said, " there was a difference
 " between debt on such a deed, and an action on a contract for
 " paying several sums at several times."

Marshall, Serjt. *contrà*. The objection made to this declara-
 tion may be divided into three parts: 1st, That no action will
 lie on the note before the last day be past. 2d, That if any
 action will lie before that day it must be *assumpsit* and not debt.
 3d, Supposing debt will lie, the plaintiff ought to have declared
 only for the instalments actually due. With respect to the first
 objection, it is said in *Co. Litt.* 292. b. " If a man be bound
 " in a bond or contract to another, to pay 100*l.* at five several
 " days, he shall not have an action before the last day be past."
 This is only applicable to deeds under seal and those single
 bonds, for where there is a penalty, the condition is broken by
 failure of payment on either of the days, and debt will lie before
 the last day be past. *Buller N. P.* 168. " But (says Lord
 " *Coke*) if a man be bound in a recognizance to pay 100*l.* at
 " five several days, presently after the first day of payment he
 " shall have execution for that sum, and shall not tarry till the
 " last day be past, for it is in the nature of several judgments."
 " So it is of a covenant or *promise*; after the first default an
 " action of covenant, or an action on the case doth lie, for they
 " are several in their nature." In *Coates v. Hewitt*, the obligee
 sued on a bond payable by instalments before the last day was past,
 and recovered: and this was long since the stat. 4 & 5 *Anne* (b),
 which relieves the defendant from the penalty on bringing

(a) 4to edition.

(b) *C.* 16. f. 13.

the principal, interests, and costs into court, yet the defendant was obliged to pay the whole debt. In *Beckwith v. Nott*, *Cro. Jac.* 504. *Assumpsit* on a promise to pay a debt by instalments was holden well to lie before the last day, and for the whole debt. In *Ashford v. Hand*, *Andr.* 370. *Assumpsit* was brought by the indorsee for a note of hand payable by instalments, and the plaintiff counted only for such sums as were due: It was objected, 1st, That the action could not be maintained till all the days were past, the contract being for an *entire sum*, though to be paid at different times; 2dly, That the plaintiff ought to have declared for the whole sum: But the court held that the plaintiff might bring an action to recover damages for every default, and that he was not *obliged* to declare for the whole sum.

With respect to the second objection, that if any action will lie, it must be *assumpsit* and not debt; it is indeed laid down in *Cro. Eliz.* 807. *Taylor v. Foster*, *Cro. Car.* 241. *Milles v. Milles*, that though *assumpsit* will lie before the last day, yet debt will not, because the contract is entire, yet this reason (which is also stated, *Owen*, 42. *Hunt's case*) is founded on the supposition that in debt the plaintiff must recover the precise sum demanded, and no more or less. But as it is now clearly settled that in debt the plaintiff may recover the sum justly due, though it be less than the sum demanded, the reason of the distinction between debt and *assumpsit* has ceased. As to the third objection, that supposing debt will lie, the plaintiff ought only to have declared for the instalments really due; the declaration sets forth the note, and states that the defendant became liable to pay him the sum specified according to *the tenor and effect of the said note*, and concludes that the defendant has not paid the sum demanded or any part thereof. It appears therefore that the plaintiff declares for no more than he is by law intitled to recover according to *the tenor and effect of the note*. If he be intitled to the whole, it is demanded; if only to the instalments due, no more can be recovered. But supposing the declaration not to be correctly right, and that it ought to have shewn that two instalments were due, and demanded them; yet as this is a mere defect of form, it cannot be taken advantage of but upon special demurrer. The defendant ought to have shewn that the plaintiff had demanded the whole debt, whereas he had only a right to demand the amount of the two instalments due at the commencement of the action. Now though the first cause of

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1791. demurrer is special, yet it states no more than this, "that the
 " sum of 52 *l.* 10 *s.* is not due yet or payable, nor can be sued
 " for till after the 1st of *January* 1791." As to the second cause
 of demurrer, it amounts to a general demurrer.

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Cur. vult advis.

On this day the opinion of the court was thus delivered by

LORD LOUGHBOROUGH.—I take it, that at the time when *Slade's* case was decided, an action of debt could not be brought on a debt due by instalments, till all the days of payment were past. But this was certainly not on the ground that the plaintiff could not recover less than the amount of the sum demanded: for though long before that time the demand in an action of debt must have been for a thing certain in its nature (a), yet it was by no means necessary that the amount should be set out so precisely that less could not be recovered. In antient times it was the common action for goods sold and delivered, and for work and labour done, in which cases, though the sum to be recovered is to be ascertained by a jury, and is given in the form of damages, still the demand is for a thing of a certain nature. The opinion indeed, which was erroneously entertained, that in an action of debt on a simple contract the whole sum must be proved, has been some time since corrected. The idea that an action of debt could not be brought till all the days of payment were past, was founded on a good ground of law, that for one contract there should be but one action; and as a contract to pay a certain sum on several days of payment was considered as one contract, it followed that no action could be brought till all the days of payment were elapsed. The construction perhaps has been too literal, for between a contract to pay five sums of 20 *l.* on five different days, and a contract to pay 100 *l.* by five sums of 20 *l.* on different days, the distinction is merely verbal and consists in form: the substantial meaning is the same in each. This construction however has long prevailed. The objection indeed is only to the construction, not to the rule of law which is evidently a just one if the contract be really entire, as to do a series of acts under a certain penalty. The history of the action of *assumpsit* given by Lord *Coke* in the second resolution in *Slade's* case is incorrect: the cases which he there cites shew that the manner in which that action

(a) In *Walker v. Winter*, Dougl. 6. Lord *Mansfield* says, "Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought."

was brought prior to *Slade's* case, was by stating, not a general *indebitatus assumpsit*, for it was not brought merely on a promise, but a special damage for a *non feasant* by which a special action on the case arose to the plaintiff (a). Thus in the case of *Norwood v. Read, Plowd.* 180. particularly referred to in *Slade's* case, which was on a contract to deliver corn at several times and at a stated price, the plaintiff declared that by the non-performance of that engagement at a particular time he had sustained this special damage, namely, that relying on the engagement of the defendant to deliver him the corn he had contracted with *A.* and *B.* to deliver to them particular quantities out of the quantity of corn which he was to receive, and was greatly injured in his credit by not being able to make good that contract with them. *Slade's* case appears to me to be the first where general damages for the non-performance of a contract were laid as the cause of action. But not long after, the action of *assumpsit* was brought following the course in which the court had supported the action in *Slade's* case, and declaring generally without stating any special damage. The plaintiff was permitted to recover in *assumpsit*, yet he was obliged to demand the whole damages for the whole contract: and it seems to have been clearly understood by Lord *Coke* when he was reporting *Slade's* case, that this was the law with respect to the action of *assumpsit*, for he states in the fourth resolution in that case that a recovery in *assumpsit* would be a bar to an action of debt on the same

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(a) Accordingly in the case 20 *Hen.* 7. 9. as cited by *Fitz-James, Dyer*, 22. b. the action was brought for the special damage on account of the non-performance of the contract to deliver corn to the plaintiff, by which he was obliged to buy other corn at a higher price. So *Tatum's* case, 27 *Hen.* 8. 24 & 25. was on a collateral undertaking to pay the debt of another, if the plaintiff in the original action would discharge him from execution; it was there holden that debt would not lie, for the defendant had not *quid pro quo*, but case or covenant if there had been a specialty. In 20 *Hen.* 7. 8. the action was case on a conversion by the vendee against the vendor, who had not delivered a quantity of malt, and three justices held against the opinion of *Frowicks*, that case would not lie, but that it should have been debt. The case 21 *Hen.* 6. 55. was trespass on the case for not delivering two pipes of wine sold by the defendant to the plaintiff; there a discourse was holden in what cases trespass on the case would lie, but no decision took place, the parties having compromised their suit. Thus too 12 *Ed.* 4. 13. was an action on the case against a bailee for using and spoiling goods; and in the same page there is a similar action for so negligently keeping a horse, kept for a certain reward, that it died. So likewise 13 *Hen.* 7. 26. was an action on the case for stopping a water-course.

contract;

1791. contract; the necessary result of which is, that in an action of *assumpsit* brought after the first default the plaintiff was obliged to go for damages for non-performance of the whole contract. Accordingly in *Beckwith v. Nott*, *Cro. Jac.* 504. the action was brought on a promise to pay four pounds by five shillings a month, and after a default of four months the whole four pounds were given to the plaintiff in damages. In reading the report of that case, the singularity of permitting the plaintiff to recover the whole sum, when only four months were in arrear, is very striking; but the court held that the jury had a right to give, if they thought fit, the whole damages for the non-performance of the contract: and the reporter adds as a note of his own, "that where a man brings such an action for breach of an *assumpsit* upon the first day, it is best to count of damages for the entire debt, for he cannot have a new action." So in a case in 9 *Car.* 1. *Peck v. Ambler*, in the margin of *Dyer*, 113. *Berkeley* held, that if an action of *assumpsit* be brought on the first default, the plaintiff should recover damages for the whole time, and should never have another action for another default; for the contract was determined, *et transit in rem judicatam* by the first action. This seems to have been understood to be the law till the case of *Cooke v. Worwood*, 2 *Saund.* 164. where the court determined, that in *assumpsit* to perform an award, whereby the defendant was awarded to pay the plaintiff several sums of money at several times, the action might be brought for such sum only as was due at the time when the action was brought, and that the plaintiff should recover damages accordingly, and have a new action as the other sums became due, *toties quoties*. Antecedent to that time, the distinction between an action of *assumpsit* and an action of debt with regard to money payable by instalments, rested on this, that the action of debt would not lie at all, till after the expiration of all the times of payment, but the action of *assumpsit* might be brought on the first default; but then that one action exhausted the whole contract, and the plaintiff was to recover damages for the whole, as he could not have a fresh action. It seems from the fifth resolution in *Slade's* case, that the action of *assumpsit* was considered as being more advantageous than the action of debt, because it might be brought after the first default, and there is something in Lord *Coke's* reasoning in that

part of the case which would lead one to suppose what he certainly could not mean, that he thought the action might be repeated. The two authorities which he there cites, viz. *Dyer*, 113. *Peck v. Redman*, and *Bro. Abr. tit. Action on the Case*, pl. 108. by no means confirm the position that *assumpsit* would lie after the first default of payment, for that default: the note in *Broks* is, "that in *Trinity* term in the fifth of *Queen Mary* it was agreed in the Common Pleas, that if a man undertake to pay 20 *l.* annually for the marriage of his daughter, for four years, and fail in the payment of two years, the plaintiff might have an action of *assumpsit* for the non-payment of the annuity for two years, although the other two years were not come." But this note is evidently an interpolation; for it appears from *Dyer*, 163. *b.* that *Broks* died upon the circuit in the vacation between *Easter* and *Trinity* terms in the 4th and 5th of *Philip & Mary*: and besides this, the determination was directly the contrary; for the case to which the note refers was *Joscelin v. Shelton*, reported 3 *Leon*, pl. 11. *Moore*, 13. *Bendlos*, in *Kilway*, 209. and was this, "*Assumpsit* was brought on an agreement by the defendant to pay to the plaintiff 400 marks in seven years by annual portions, in consideration of the marriage of the plaintiff's son with the defendant's daughter, and after verdict the judgment was arrested, because the whole seven years were not expired, one of them being to come when the action was brought." The other case cited by Lord *Coke* of *Peck v. Redman*, *Dyer*, 113. was of an agreement by the defendant to deliver to the plaintiff twenty quarters of barley every year during their lives, for which the plaintiff was to pay four shillings for each quarter, and the breach of the agreement was, that the defendant had failed in the delivering of eleven quarters for three years, by which the plaintiff (the special damage being similar to that stated in the case which I mentioned from *Plowden*) was injured in his credit, and the profit he would otherwise have made, to the value of 30 *l.*: but it would have been a very singular thing if the rule of construction which was laid down in actions of debt, had been applied to such a contract as this, the proof of which, in all the terms of it, was not complete as long as both the parties were alive. The jury gave damages for three years, and the question was, Whether these damages were for the whole contract or not? *Dyer* states that three judges were of opinion that this recovery was a discharge

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a discharge of the whole contract, but that the other three held (which seems much more reasonable) that it was not: however, as the court was divided, no determination was given, and the case ends with *ideo quære*. In the older cases, it is admitted, that an *action of debt* could not be brought for the payment of money due by instalments till all the days were past: the meaning of this was, that no *action* would lie. The inconvenience of this rule put the judges upon a method of getting rid of the supposed difficulty, by having recourse to the action of *assumpsit*, which, where the *assumpsit* proceeds in demand of money, is in truth and substance, and so taken to be in some of the cases, a more special action of debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered *damages*: it is the specific debt, and the jury give the specific thing demanded. In *Owen*, 42. (a) the inconvenience of the rule which the Chief Justice *Anderson* was about to proceed upon, though the determination was contrary to his opinion, is so very obvious, that I mention it as a striking instance of the mischief which would have arisen, if a method had not been found out to remedy it. It was an action on the case on an agreement in consideration that the plaintiff would permit the defendant to occupy certain lands for five years, to pay 20*l.* a-year by equal half-yearly payments of 10*l.* after a year and a half were expired the action was brought for the rent then in arrear, and *Anderson* was of opinion that the plaintiff could recover no rent till the five years were elapsed, but the other judges were of a different opinion. In the cases in *Cro. Eliz.* 807. *Cro. Jac.* 504. and *Cro. Car.* 241. *assumpsit* was brought for money due by instalments, and so attentive were the court to the rule at that time, that the plaintiff in the two latter cases recovered in damages the whole sum, including a payment not due, and the court supported the recovery, and gave judgment for him, saying in one of the cases (b), (where the sum to be paid was 20*l.* viz. 10*l.* in one year, and 10*l.* in another, and the whole 20*l.* given as damages for the non-payment of the first 10*l.*) that they would intend that the damages of 20*l.* were given only for the first 10*l.* There is so little reason in this that there is some difficulty to follow it; but the foundation of the opinion fails, when it is admitted that the sum really due may be recovered notwithstanding more is demanded than can be made good in evidence. I cannot indeed

(a) *East's case*.(b) *Miles v. Miles*, *Cro. Car.* 241.

Devise a substantial reason why a promise to pay money not performed, does not become a debt, and why it should not be recoverable, *eo nomine*, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of *assumpsit*, no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and being so considered, no action of debt can be maintained upon it till all the days of payment be past.

Judgment for the defendant (a).

Afterwards the plaintiff had leave to amend.

(a) [See *Bishop v. Young*, ii. B. & P. 78. that debt will lie by the payee against the maker of a promissory note expressed to be for value received.]

TAYLOR v. COLE and Another in Error.

(In the Exchequer Chamber. See 3 Term Rep. B. R. 292.)

Friday,
Feb. 11th.

IN this action of trespass, the first count of the declaration stated that the defendants with force and arms *broke and entered* a certain house of the plaintiff called the King's Theatre or Opera House, *and expelled, put out, and amoved* him from the occupation, possession, and enjoyment of the same, and kept and continued him so expelled, &c. by means of which the plaintiff was prevented from performing operas, &c. and was deprived of the service of the several performers, &c. with other circumstances of special damage. The second count was, that the defendants with force and arms *expelled, put out, and amoved* the plaintiff from the possession and occupation of a certain other house of the said plaintiff called the King's Theatre or Opera House, &c. stating special damage, but not so particularly as in the first count. The defendant pleaded. 1st, The general issue not guilty. 2d, A justification of *the breaking and entering* in the first count, as Sheriff of Middlesex under a *fi. fa.* at the suit of one *Joseph Hayling*. 3d, A justification of *the expulsion* in the second count under a *fi. fa.* at the suit of *R. B. Sheridan Esq*; that the plaintiff at the time of the execution of the writ, was possessed of a certian interest in the residue of a certain term of years then to come and unexpired in the said house, &c.; that by virtue of the said writ the defendant seized the said interest of the plaintiff in the term, and sold and assigned it to *T. Harris*, who afterwards entered into the said house, the door of the said house being then open, and peaceably and quietly expelled the plaintiff.

In trespass for breaking and entering the plaintiff's house and expelling him from it, a justification as to the breaking and entering will cover the whole declaration; for the expulsion is to be considered as mere matter of aggravation, and not as making the defendant a trespasser *ab initio*, unless the plaintiff insist upon it as a substantive trespass, by a replication or new assignment.

Issue

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Issue was joined on the plea of not guilty, and there was a demurrer to each of the justifications.

The entry of the verdict on the issue was, that the (a) defendant was "guilty of the premises in the first count of the said declaration laid to his charge, except the coming with force and arms therein mentioned, in manner and form as the within named plaintiff within complains against him, and the jurors aforesaid assess the damages of the said plaintiff by him sustained on occasion thereof, in case judgment should be therein given for the said plaintiff, besides his costs and charges by him laid out about his suit in this behalf, to 500 l. and for his said costs and charges to forty shillings: and as to the coming with force and arms in the first count of the said declaration mentioned, and as to the premises in the last count of the said declaration mentioned, the jurors aforesaid, upon their oaths aforesaid, say that the said defendant is not guilty thereof, in manner and form as he hath in pleading alleged." The judgment was, "that it appears to the said court, that the said plea of the said defendant by him secondly above pleaded, as to the *breaking and entering* the said house of the said plaintiff in the said first count of the said declaration mentioned, and the matters therein contained *are sufficient in law* for the said defendant to bar the said plaintiff from having and maintaining his aforesaid action thereof against him the said defendant in manner and form as the said defendant hath above in pleading alleged. *Therefore it is considered that the said plaintiff take nothing by his said bill, but that he and his pledges of prosecuting, to wit, John Doe and Richard Roe be in mercy, and that the said defendant go thereof without day, &c.* And it is further considered by the court of our said lord the king now here, that the said defendant recover against the said plaintiff 78 l. 10 s. for his costs and charges," &c.

The assignment of errors was, "that judgment is given for the said defendant against the said plaintiff on the first count of the said declaration generally, whereas by the law of the land judgment ought to have been given for the said plaintiff, to recover against the said defendant the damages, costs, and charges assessed by the jury on that count, together with his costs and charges of increase, inasmuch as the plea of the said defendants by them severally pleaded in bar *to part of that count*, and the matters therein contained are not

(a) There was a suggestion of the death of one of the defendants.

"sufficient

“ sufficient in law to bar the said plaintiff from having and
 “ maintaining his said action against the said defendant. There-
 “ fore in this there is manifest error. There is error also in
 “ this, that judgment is given for the said defendant against the
 “ said plaintiff on the first count of the said declaration generally,
 “ whereas by the law of the land judgment ought to have been
 “ given for the said plaintiff, to recover against the said defend-
 “ ant, the damages and charges assessed by the jury on that
 “ account, together with his costs and charges of increase,
 “ *inasmuch as the subsequent expelling, putting out, and removing*
 “ *the said plaintiff from the occupation, possession, and enjoyment of*
 “ *the said house in the first count of the said declaration mentioned,*
 “ *and keeping and continuing the said plaintiff so expelled, put out,*
 “ *and removed from the said possession, occupation, and enjoyment*
 “ *thereof, whereof the said defendant is found guilty, and which*
 “ *is not attempted to be justified, after the entering into the said*
 “ *house under colour of the said writ of fieri facias, by the law of*
 “ *the land make the said entry tortious, and the said defendant a*
 “ *trespasser from his said entry into the said house, being one con-*
 “ *tinued act of trespass;* in this therefore there is manifest error.
 “ There is also error in this that judgment is given generally that
 “ the said plaintiff take nothing by his said bill, whereas judgment
 “ ought at least to have been given that he should recover his damages
 “ by reason of the expelling, putting out, and removing the said
 “ plaintiff from the occupation, possession, and enjoyment of the said
 “ house in the first count of the said declaration mentioned, and
 “ keeping and continuing the said plaintiff so expelled, put out, and
 “ removed from the possession, occupation, and enjoyment thereof, and
 “ the consequential damages thereon, the said defendant having
 “ been found guilty thereof, and the same not being justified, and a
 “ new writ of venire ought to have been awarded to assess such
 “ damages; therefore in this there is manifest error,” &c.

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This was twice argued in the Exchequer Chamber; on the
 first argument, by *Wood* for the plaintiff in error, and *Gibbs* for
 the defendant; on the second, by *Lawes* for the plaintiff, and
Chambre for the defendant. The following was the substance
 of the arguments on the part of the plaintiff.

As the expulsion in the first count is not covered by the first
 justification but denied only by the plea of not guilty, and as the
 jury have found the defendant guilty of the trespasses charged in
 that count, the plaintiff must be intitled either to the whole
 damages given on the first count, or at least to a *venire de novo*

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to sever and assess them. Though the entry of the sheriff was lawful, yet he had no right to expel and keep the plaintiff out of possession of his house: having done this he was guilty of a trespass, and that trespass commenced from his entry, it being clear law that a person abusing a legal authority becomes a trespasser *ab initio*. 8 Co. 146. a. *Six Carpenters' case*. In *Reed v. Harrison*, 2 Black. 1218. it was holden that an officer, who continued an unreasonable time in possession had so abused his authority as to become a trespasser *ab initio*. It is plainly to be collected that the entry and expulsion as stated in the first count, were done at one and the same time; the court therefore will presume that they were one continued act, though the words "then and there" be omitted. *Cro. Jac.* 41. But if the expulsion should be considered as a distinct and substantive trespass, then the plaintiff ought to have a *venire de novo*, to sever and assess the damages. It has been said, that as part of the trespass was justified, the other part, *viz.* the expulsion, was mere matter of aggravation; and that if the plaintiff had designed to insist upon that as a distinct injury, he ought to have pointed out his design by a new assignment. But a new assignment would have been unnecessary and improper in this case. The object of a new assignment is to explain that more fully which was before apparently answered. Here the justification is totally silent as to the expulsion which is denied only by the general issue. A new assignment therefore of the expulsion could not be applied to any thing disclosed in the plea of justification, but merely to the plea of not guilty, and therefore could only be a repetition of the charge. Where the plea covers the whole trespass but mistakes it, there the plaintiff must new assign to explain; but not where a part is justified and part denied. Where indeed the whole trespass is justified and the justification may be avoided by a new circumstance, the plaintiff may introduce that circumstance in his replication; as in trespass for taking cattle and detaining them, if the defendant pleads a distress, the plaintiff may reply an abuse of the distress: this avoids the plea, but would be very improperly called a new assignment. A new assignment is as a new declaration, but that is only necessary where the first declaration is denied. This has been compared to an action of trespass and conversion, in which, if the trespass be justified, there is no necessity to answer the conversion: but the reason is, that the conversion is not a trespass, and would not of itself be a ground of an action of trespass. A count in trespass is divisible; the whole need not be proved; as if

if it be for an assault and taking the plaintiff's goods, there, though the assault be not proved, yet the plaintiff may recover on the *asportavit*. So in trespass *quare clausum fregit* and imprisonment of the person; so in assault and imprisonment. The true criterion by which mere matter of aggravation is distinguished is this, that if the preceding charge be taken away, the aggravating circumstances will not, by themselves, be sufficient to support an action of trespass. Now here the contrary is evidently the case: expulsion is a trespass of itself, and might be alone the subject of an action of trespass. It is, in its nature, a distinct act from the entry. There may be an entry without an expulsion, though there cannot be an expulsion without an entry. The plaintiff might in the first count have entered a *nolle prosequi* as to the entry, and proceeded on the expulsion alone. The second count indeed states the expulsion without the entry. If the subsequent acts accompanying a trespass were merely matters of aggravation, they would not have been stated in the writ; but the writ comprehends many distinct causes of action according to the antient forms. *Registr. Brev.* 92. Neither would the entries and precedents in pleading justify all the circumstances of trespass, as in the common case of *liberum tenementum* pleaded as well to an expulsion as to a breaking and entering: nor would judgment ever be arrested on account of additional matter of trespass being improperly charged, as in 5 Co. 34. *b.* *Playter's case*, (*S. P. Stra.* 637.) where in trespass for breaking the plaintiff's close and taking his fish, the defendant pleaded not guilty, and was found guilty and damages given generally, judgment was arrested because it was not stated of what kind the fish were, and how many were taken; in which case the court also said, that as the jury had found the defendant guilty generally, that, without question, extended to the whole declaration, and they could not intend that the jurors found him guilty only for breaking the close, for which the declaration was good; but if the plaintiff's counsel had done wisely, they would have *caused the damages to be severed*. Neither would the doctrine of discontinuance have ever prevailed, where the plaintiff in a subsequent part of the pleadings abandons the circumstances attending the first act of trespass; nor would a plea be bad on account of its not answering the whole declaration, if the charge, not pursued in the one case, and not answered in the other, could be deemed mere matter of aggravation. In *Cro. Eliz.* 268. a justification to a

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charge of assault, battery, and wounding, was holden to be bad because it only covered the assault and battery, and not the wounding. So in trespass for breaking the plaintiff's close and destroying his hop-poles, the defendant pleaded *liberum tenementum*, and that he took the hop-poles damage *feasant*, which was decided to be bad, because the *destruction* of the hop-poles was not answered. The judgment therefore of the King's Bench is erroneous, on one of these two grounds, either that the plaintiff was intitled to the whole damages, or to a *venire de novo* to sever them.

On the part of the defendant in error, the material arguments were these: The expulsion was merely a matter of aggravation and the consequence of the entry. The justification goes to the whole charge except the matter of aggravation; and if the plaintiff had designed to rely on that which is stated as a mere aggravation, he ought to have given the defendant notice of it by a replication or a new assignment. 1 *Ventr.* 211. 217. Sir *R. Bury's* case, 2 *Wils.* 313. *Gates v. Bailey*, 3 *Wils.* 20. *Dye v. Leatherdale*, and *Fisherwood v. Cannon*, cited 3 *Term Rep. B. R.* 207. by *Buller, J.* in this case. There cannot be an expulsion without an entry. But an expulsion is not *ex vi termini*, a trespass; there are many instances where an expulsion alone is not a trespass. It is like a conversion to which no answer need be given in the plea, and is not so connected with the entry, that they cannot be separated. The common words "*then and there*" are omitted. An exclusion is an expulsion, but may or may not be a trespass, according to circumstances. No case has been cited to shew that trespass could be brought for an expulsion alone. It is admitted that the entry and expulsion are divisible acts. Under this count evidence might have been given of an expulsion at a different day; the finding therefore of the jury does not necessarily imply that the defendant was a trespasser *ab initio*. The court cannot say, that it appears on the record, that he was such a trespasser. No instance can be produced, where it was inferred from any thing stated in the declaration that the defendant was a trespasser *ab initio*. In *Cro. Jac.* 147. it was alleged in the replication. So in the Year Book, 11 *Hen.* 4. 75. *b.* where in an action of trespass for breaking and entering the plaintiff's close and house, the defendant pleaded that he had leased the premises to the plaintiff for a term of years, and being informed that waste had been committed, entered to see if it were so, and

and the plaintiff *replied* that the defendant staid a day and a night in the house against the will of the plaintiff. As therefore it does not appear on the record that the expulsion was not a matter of aggravation, and as the plaintiff has not stated any thing by way of replication to shew that the defendant was a trespasser *ab initio*, the court below were well warranted in the judgment which they have given.

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On this day the judgment of the court was thus given by

LORD LOUGHBOROUGH.—The plaintiff in this case declares in the first count, that the defendants broke and entered his house and expelled him from the possession of it, whereby a special damage accrued to him; in the second count, that they expelled, put out, and amoved him from his house, whereby he also sustained special damage. The defendants after pleading not guilty, justify the breaking and entering in the first count under a writ of *feri facias* directed to them as sheriff of *Middlesex*, to levy for the debt of *Joseph Hayling*; they justify the expulsion in the second count under another *feri facias* by which they sold the plaintiff's term in the house to *Harris*, who entered and expelled him. Issue is joined on the plea of not guilty, and there is a demurrer to the two justifications. The issue is found for the plaintiff as to the first count with contingent damages, and for the defendant as to the second, and judgment is given for the defendant on the demurrers.

On the argument of the writ of error the plaintiff insists,
 1. That the verdict on the general issue intitles him to judgment for the expulsion as a trespass not covered by the justification, and that he is intitled to all the damages, the defendants becoming by the expulsion trespassers *ab initio*. Or 2dly, That he is intitled to damages for the expulsion, and to have a *venire de novo* to assess those damages. The first point was not much laboured, for the damages assessed by the jury on a supposition that the defendant had broke and entered the house and expelled the plaintiff can never be the just measure of damages when the principal part of the acts imputed to the defendants are found to be legal. On the second point, it is evident that the plaintiff would be intitled only to nominal damages if a new *venire* were awarded; for where the expulsion was stated as a substantive trespass, the jury found the defendant not guilty, and one must suppose that they would have done the same on the first count, had the expulsion been stated as an actual independent trespass. It is not necessary to consider in what cases expulsion may be a substantive

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trespass. Undoubtedly to enter into a house and to expel the possessor may be distinct acts, and they may be also connected. But when the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should either by replication or new assignment state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The plaintiff complains that the defendant broke and entered his house and expelled him: the defendant shews a justification of the entry: if the expulsion makes him a trespasser *ab initio* it takes away his justification, and therefore should be replied. If it be not replied the plaintiff can take no advantage of it, for by demurring he admits that the whole trespass is met by the plea. So in the *Six Carpenters'* case it is plain, that if the plaintiff would make the defendant a trespasser *ab initio* he must shew in reply that which makes him so. On these grounds therefore we think that the judgment ought to be affirmed.

Judgment affirmed.

Friday,
Feb. 11th.

RUSSELL v. STOKES, in Error, in the Exchequer Chamber.

(For the Pleadings and Judgment in this Case, see 3 Term Rep. B. R. 678. and also the Case of *Webb v. Russell*, *Ibid.* 393.)

A. being
possessed of
a term for
years con-
veys it by
way of mort-
gage, and
then joins
with the
mortgagee in
a lease for a
shorter term,
according to
which respec-
tive covenants
and interests,
and the lessee
covenants
with the mortgagor
and his assigns
to pay rent and
keep the premises
in repair. During
the term with all
the estate and in-
terest of mortgagor
and mortgagee be-
comes vested in
the assignee
of the mortgage,
yet the mortgagor
may afterwards
maintain an action
of covenant against
the lessee,
the covenants
being in gross.

THE assignment of errors was, "That by the declaration
afore said it appears that the several covenants therein
mentioned and thereby alleged to have been made by the said
George (the plaintiff in error) with the said *William* the de-
fendant in error) were so made by him the said *George* with the
said *William* in respect of the estate and interest of the said
William in the said demised premises with the appurtenances, and
it does not appear thereby that the said covenants were made
with the said *William* or that the action was brought by him in
trust for any other person or persons whatsoever: and although
it is stated and appears in and by the several pleas of the said

George, that the said *George* and his assigns to pay rent and keep the premises in repair. During the term with all the estate and interest of mortgagor and mortgagee becomes vested in the assignee of the mortgage, yet the mortgagor may afterwards maintain an action of covenant against the lessee, the covenants being in gross.

George

George, by him secondly, thirdly, fourthly, and lastly above pleaded in bar, that the estate and interest of the said *William* in the said demised premises, with the appurtenances, in respect of which the said covenants were so made as aforesaid, became and was wholly ended and determined before the supposed breaches of covenant in the said declaration mentioned, yet by the record aforesaid, it is adjudged that those pleas and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar the said *William* from having and maintaining his aforesaid action against him the said *George*: therefore in this there is manifest error, &c.

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This was argued by *Maryatt* for the plaintiff in error, and *Shepherd* for the defendant; (see 3 Term Rep. B. R. 393. 687. above referred to;) and on this day, after consideration, the judgment of the court of Exchequer Chamber was given as follows by

LORD LOUGHBOROUGH:—The plaintiff in this case declares, on a demise to the defendant for eleven years of a messuage, &c. made by the plaintiff and *Richmond Webb*, by which the plaintiff and *Richmond Webb*, according to their respective estates and interests, did demise, lease and confirm to the defendant *Russell* the premises for the term of eleven years, yielding and paying to the plaintiff *Stokes*, his executors, administrators, and assigns, a rent of 200 *l. per ann.* and *Russell* covenants with *Stokes* to pay the rent to *Stokes*, and to keep the premises in repair. The breach assigned is the non-payment of rent for two years and a half, and not repairing.

The defendant, after pleading the general issue, *non est factum*, by his special plea in bar says, that *Webb* at the time of the demise was possessed of the premises for a term of 99 years, subject to an equity of redemption in *Stokes*, on payment of a certain sum of money; that the covenants were made by him with *Stokes* in respect of the several estates and interests of *Stokes* and *Webb*, or one of them, in the demised premises, and not otherwise. The plea then introduces a recital of a conveyance of the inheritance of the premises from one *George Medley* to *Stokes*, and one *Morgan Thomas*, in trust for *Stokes*; a conveyance by *Thomas* and *Stokes* to one *Makepeace Thackeray*, in trust for *Webb* and his heirs, subject to redemption by *Stokes* on payment of a certain sum to *Webb*, his executors, administrators or assigns. It then states, that *Russell* being possessed of the term for eleven years, the reversion of the term for ninety-nine years, and

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also the reversion in fee, belonging respectively as aforesaid, subject to such equity of redemption, (that is, the reversion of the term and also the reversion of the inheritance as *cestui que trust* being in *Webb* as mortgagee,) *Webb* died, by will having bequeathed all his worldly estate to *Sarah* his wife, and appointed her executrix; that she proved the will and assented to the bequest, by virtue whereof she became possessed of the residue of the term for 99 years, the reversion of the inheritance being in *Thackeray*, subject to such trust as aforesaid; (that is, for *Webb* as *cestui que trust* in fee, subject to an equity of redemption in *Stokes*;) that *Thackeray* and *Stokes* afterwards conveyed to *Sarah Webb*, the reversion discharged of the equity of redemption; and the plea concludes, that by virtue thereof the respective estates and interests of *Webb* and *Stokes* in the said demised premises, in respect whereof the covenants were made by *Russell* with *Stokes* became merged, extinguished, and determined. The second and third pleas contain an abridgment of this state of the title, with the same conclusion. To the plea there is a special demurrer.

If it were material to enter into a discussion of the defects of the plea, it seems liable to every objection of uncertainty and contradiction. The first and capital averment, viz. "that the covenants by *Russell* with *Stokes* were made in respect of the estates and interests of *Stokes* and *Webb*, or one of them," is a proposition merely vague, on which no one issue can be joined, nor one traverse taken. The same defect occurs in the conclusion drawn by the plea from the statement of the title. The plea itself is an inconclusive, imperfect, and vague argument. The merger, the extinguishment, and the determination of a term are separate and distinct propositions. A term may be merged in the inheritance; it is determined by the effluxion of time or by the act of the parties; it is extinguished by the re-entry of the lessor on an act of the lessee forfeiting his term. But it cannot be both merged and determined: nor would it be quite accurate to say that it was extinguished and determined; but it is certainly absurd to say that it was extinguished and merged. To state it then to have been merged, extinguished, and determined is manifestly incongruous. And these various conclusions are not warranted by the premises. The term of 99 years could not merge in *Webb* by the conveyance to *Thackeray* under which *Webb* became *cestui que trust* of the inheritance in fee, the legal estate being in *Thackeray*. As little could it merge by the conveyance from *Thackeray* to *Mrs. Webb*, for it does not appear by any thing

thing stated in the plea, that the equitable estate in fee passed to her by the will of *Webb*. A bequest of all his worldly estate to his executrix, which is all that is stated, would not vest the estate in fee of which he was seised in equity by the conveyance to *Thackeray*, and Mrs. *Webb*, if she took no more than the plea discloses under her husband's will, was as much a trustee of a legal reversion as *Thackeray*. That the term was not *determined*, the possession of the defendant shews.

The opinion of the court however has not been formed on objections to the form of the plea. We are for affirming the judgment on reasons which apply directly to the merits of the case. The defendant, a lessee in possession, objects to the payment of rent sued for under an express covenant in the lease, that the person to whom he had bound himself to pay the rent was the mortgagor in possession of the estate demised, that he covenanted to pay the rent in respect of *the interest or estate*, which at the date of the demise the plaintiff had in the land, and that the plaintiff has since assigned over that interest to the mortgagee. In this lease the mortgagee is also a party joining in the demise. Now, it is obvious on this state of the defence, that the defendant would likewise object to the mortgagee, that he had not covenanted to him to pay the rent, and that his interest or estate was not the same, (though better,) as it was at the time of the demise. The defendant has in fact done this with the mortgagor*. It would be a strange reproach to the law, if it were to allow such a defence as this: "I have contracted with both of you in respect of your estates, you have each of you performed your part, and I hold the possession; but I will pay neither, because between yourselves you have transferred your estates without any prejudice to me:" but no such absurd injustice is to be imputed to the law of *England*. The present case is the demand of that lessor to whom the defendant is bound to pay for the occupation of the land, I will add, in respect of his interest in the land. Can there be any discharge of that obligation, but that he has been evicted, or that the obligation has been transferred to another? The first is not pretended; the second is the aim of the plea, but is totally groundless, because on the defendant's own shewing, that other person is the representative of the party to the demise who has assented to the payment to the plaintiff. The defence now made is as absurd as if the defendant had set up a right in *Webb* against the first payment of rent to *Stokes*. There would then be little difficulty in deciding this plain question; Whether *Russell* holding under this demise could set up the right of *Webb* against

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the action of *Stokes*. But shutting out every consideration of justice, and taking law for a moment to be an abstract system of positive rules, the defence set up is as unscientific as it is unjust. *Webb* and *Stokes* demise according to their respective estates and interests: *Russell* covenants with *Stokes* to pay the rent to him. What was the estate and interest of *Stokes*? The argument does not require me to state that in a court of law *Stokes* had no estate, that his interest was only a possession as tenant at will to *Webb*, and that the covenant in respect of such an interest must continue as long as the possession, which was ceded by him, continued; otherwise it would cease the moment it could begin to operate. I will state his interest to be more than the plea explicitly states, and all that a court of equity takes it to be. Let him be *cestui que trust* of the land subject to the mortgage to *Webb*: I then apply to that state of the case the known and established rule of the common law, that if *cestui que use* and his feoffees join in making a feoffment; it shall take effect as the feoffment of the feoffees by the common law, and not of *cestui que use* by the statute 1 Ric. 3. c. 1. Co. Lit. 49. a. So it is of a demise by *cestui que use* and his feoffees, the term of the lessee shall take effect out of the estate of the feoffees though *cestui que use* had by the statute full power to demise by himself. 2 Co. 35. b. *Heyward's* case. The term then in this case took effect out of the estate of *Webb*: the covenant with *Stokes* could not be incident to that estate nor run with the land; it must be a covenant in gross, and consequently not assignable. In strict law therefore as well as substantial justice, the judgment of the court of King's Bench must be affirmed.

Judgment affirmed.

Friday,
Feb. 11th.

WILLIAMS and Another, Executors of BRAHAM v.
RILEY in the Exchequer Chamber in Error.

Executors
and admini-
strators are

liable to costs in error in cases where they would be liable in the original action.

JUDGMENT *de bonis testatoris* (a) having been given in the court of King's Bench against the plaintiffs in error,

(a) The entry of the judgment was in the usual form, the damages and costs "to be levied of the goods and chattels which were of the said — (the testatrix) at the time of her death, in the hands of — the said (the executors) to be administered, and if they have not so much in their hands to be administered, then the costs and charges to be levied of the proper goods and chattel of the said — (the executors)," &c.

on a verdict in an action of *assumpsit* against them as executors, and that judgment affirmed (without argument) in the Exchequer Chamber, the clerk of the errors allowed costs to the defendant in error.

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In consequence of this *Wilson* moved for a rule to shew cause why the costs should not be disallowed, on the ground that where executors and administrators were plaintiffs in error, especially on a judgment *de bonis testatoris*, they were not liable to costs; and the authorities he cited were *Cro. Jac.* 352. *Goldsmith v. Platt*, 1 *Sid.* 368. *Fitzwilliams v. Moore*, 1 *Lev.* 245. *S. C.* 1 *Ventr.* 166. *Legg v. Richards*, 2 *Stra.* 1072. *Saltern v. Wynne*, *Rep. Temp. Hardwicke*, 307. *S. C. & Stat.* 16 & 17 *Car.* 2. c. 8. s. 2.

Le Blanc, Serjt. opposed the motion in the first instance, contending that where executors and administrators were liable to costs in the original action, they were also liable if error were brought on the judgment; that as they were defendants in the original action, in the present instance they were liable to costs in that action, and that liability continued in error. The judgment here as to the costs is *de bonis testatoris, et si non, de bonis propriis*; with respect to costs therefore the executors stand in the same situation as any other person. The statutes on the subject make no exception as to executors and administrators. 3 *Hen.* 7. c. 10. the first statute which gave costs in error contains no such exception, nor 3 *Jac.* 1. c. 8. nor 13 *Car.* 2. s. 2. c. 2. s. 9 & 10. The 16 & 17 *Car.* 2. c. 8. s. 5. means only that executors and administrators shall not be obliged to find bail in error. The case cited of *Goldsmith v. Platt* decides only that they need not put in bail, which is totally different from the question of costs, bail being to answer the debt, to which executors and administrators are clearly not liable on such a judgment as this, though they are to costs. The distinction, that where executors and administrators would be liable to pay costs in the original action they are also liable in error, but that where they are not liable in the original action they are not liable in error, is clearly to be collected from 3 *Lev.* 375. *Gale v. Till*, 4 *Mod.* 244. *Comberb.* 228. *S. C.* (in which case the administrator was plaintiff in the original action), and also from *Caswall v. Norman*, 2 *Barnardist.* 450. (imperfectly reported, 2 *Stra.* 977) (a) where the Chief Justice expressly takes the distinction.

Cur. vult advis.

On

(a) I have been favoured with the following authentic note of that case. *Caswall v. Norman*, *Euft.* 2 *Ceo.* 2. *B. R.* The defendant was sued as executor, and judgment

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On this day Lord *Loughborough* declared the unanimous opinion of the court, that the distinction taken in the argument by *Le Blanc* was well founded, and conformable to a case on the same subject which the court of Exchequer Chamber decided about three years ago: and therefore the clerk of the errors had done right in allowing costs in the present instance.

Rule refused.

was given against him *de bonis propriis*, and on error brought, the court thought fit to affirm the judgment, but now the question was, Whether it should be with costs or not? *Tates* cited the following cases, to shew that executors bringing writs of error should not pay costs, because what they do is in *autre droit*, 3 *Lev.* 375. 1 *Mod.* 76. 4 *Mod.* 244. But in those cases the executors were plaintiffs in the original actions. The court called on him to shew any cases where an executor had been defendant in the original action, and judgment given against him *de bonis propriis*, and after judgment on error affirmed, had not been obliged to pay costs: but he could shew none. *Parker* cited 1 *Sid.* 368. as an authority to shew, that on error in such cases the executor should put in bail. But Lord *Hardwicke*, Ch. J. said, the case of bail would not govern this case, because the bail are to answer the action; and there is no distinction between executors and other persons, when defendants, as to costs in original actions, though where the executor is plaintiff he is distinguished out of the statutes. Here in the first judgment he is to pay damages out of his own estate, then why shall he not on writ of error? *Per Curiam*:—The Master must tax the costs on error brought, the judgment against the executor being affirmed.

In the HOUSE OF LORDS, *Monday, Feb. 14.*

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(The Reporter has been honoured with copies of the opinions of the Judges, delivered *Feb. 3.* on the following Case, each from the highest authority.)

GIBSON and JOHNSON v. MINET and FACTOR.
In Error (a).

London, } **T**HOMAS Gibson, late of *London*, merchant, and (to wit.) } Joseph Johnson, late of the same place, merchant, were attached to answer *Hughes Minet* and *James Peter Fector*, in a plea of trespass on the case. And thereupon the said *Hughes* and *James Peter*, by *Edwin Dawes* their attorney, complain, For that whereas certain persons using trade and commerce as co-partners, in the co-partnership, name, and firm of *Livesay, Hargreave* and Co. on the 18th day of *February*, in the year of our Lord 1788, at *Manchester*, to wit, at *London* aforesaid, at the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, according to the usage and custom of merchants, made their certain bill of exchange in writing, the hand of one of the said co-partners on their joint account, and in their co-partnership, name, and firm, to wit, *Livesay, Hargreave*, and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and directed the same bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*, and thereby required the said *Thomas Gibson* and *Joseph Johnson*, three months after date, to pay to Mr. *John White*, or order, 721 l. 5s. value received, with or without advice; they the said *Livesay, Hargreave* and Co. then and there well knowing that no such person as *John White*, in the said bill of exchange mentioned, existed. Upon which said bill of exchange, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of *John White* named in the said bill, and to be subscribed with his hand and name, and which said indorsement purported to require the said sum of money, in the said bill of exchange contained, to be paid to the said *Livesay, Hargreave*, and Co. or their order. And the said bill of exchange being

If a bill of exchange be drawn in favour of a fictitious payee with the knowledge as well of the acceptor as the drawer, and the name of such payee be indorsed on it by the drawer with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself or his order, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted, but it does not appear that there was an intent to defraud any particular person: such innocent indorsee for a valuable consideration may recover against the acceptor as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor as on a bill payable to the order of the drawer; or on a count stating the special circumstances.

(a) See 3 Term Rep. B. R. 431. [See also pa. 321. of this vol. and the note there.]

1791. so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of *Livesey, Hargreave, and Co.* as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said bill of exchange and subscribed with the hand and name of one *Abraham Goodrich*, by procuration of the said *Livesey, Hargreave and Co.* according to the usage and custom of merchants, appointed the said sum of money, in the said bill of exchange contained, to be paid to the said *Hughes and James Peter*, and then and there delivered the said bill of exchange so indorsed as aforesaid, as well with the name of the said *John White*, as with the name of the said *Abraham*, to the said *Hughes and James Peter*; which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said *Thomas Gibson and Joseph Johnson*, for their acceptance thereof; and the said *Thomas Gibson and Joseph Johnson* then and there, according to the usage and custom of merchants, accepted the same, they the said *Thomas Gibson and Joseph Johnson*, then and there well knowing that no such person as *John White* in the said bill of exchange named, existed; and that the name of *John White* so indorsed on the said bill of exchange, was not the hand-writing of any person of that name; by reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson and Joseph Johnson* became liable to pay the said *Hughes and James Peter*, the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said *Thomas Gibson and Joseph Johnson* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Hughes and James Peter* then and there faithfully promised to pay them the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and their acceptance thereof, as aforesaid. And whereas also, the said persons using trade and commerce as co-partners in the co-partnership, name, and firm of *Livesey, Hargreave, and Co.* on the said 18th day of *February*, in the said year of our Lord 1789, at *Manchester*, to wit, at *London* aforesaid in the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of

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the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, *Livesey, Hargreave and Co.* being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned bill of exchange to the said *Thomas Gibson and Joseph Johnson*, by the names and description of Messrs. *Gibson and Johnson*, bankers, *London*; and thereby required the said *Thomas Gibson and Joseph Johnson*, three months after date, to pay, to Mr. *John White*, or order, 721 l. 5 s. value received, with or without advice; they the said *Livesey, Hargreave and Co.* then and there well knowing that the said last named *John White* was not a person dealing with, or known to the said *Livesey, Hargreave, and Co.* and using the name of the said *John White*, in the same bill, as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually indorsed by him; upon which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of *John White* named in the said bill, and to be subscribed with his hand and name; and which said last mentioned indorsement purported to require the said sum of money, in the said bill of exchange contained, to be paid to the said *Livesey, Hargreave, and Co.* or their order: And the said last mentioned bill of exchange, being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of *Livesey, Hargreave, and Co.* as aforesaid, afterwards, to wit, at the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, by a certain indorsement and writing made upon the said last mentioned bill of exchange, and subscribed with the hand and name of one *Abraham Goodrich*, by procuration of the said *Livesey, Hargreave, and Co.* according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said *Hughes and James Peter*, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid, to the said *Hughes and James Peter*, without having delivered the same bill to the said *John White*, and without any actual indorsement or assignment of the same bill by the said *John White*; which said last mentioned bill of exchange, so indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, according to the usage

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of: and the said *Thomas Gibson* and *Joseph Johnson*, then and there well knowing that the said *Livesey, Hargreave, and Co.* had made and delivered the same bill in manner aforesaid, and with such intention as aforesaid, and that the name of *John White*, indorsed upon the said last mentioned bill of exchange, was not the proper hand-writing of *John White* in the same bill mentioned, then and there accepted the same: By reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson* and *Joseph Johnson* became liable to pay to the said *Hughes and James Peter* the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said *Thomas Gibson* and *Joseph Johnson*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and to the said *Hughes and James Peter* then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange contained according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid. And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership, name, and firm of *Livesey, Hargreave, and Co.* on the said 18th day of *February*, in the year of our Lord 1788, at *Manchester*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership, name, and firm, to wit *Livesey, Hargreave, and Co.* being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson and Johnson*, bankers, *London*; and thereby required the said *Thomas Gibson* and *Joseph Johnson*, three months after date, to pay to them the said *Livesey, Hargreave, and Co.* by the name and description of Mr. *John White*, or order, 721 l. 5 s. value received, with or without advice. And the said persons so using trade and commerce in the name and firm of *Livesey, Hargreave, and Co.* as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by a
certain

certain indorsement in writing made upon the said last mentioned bill of exchange, subscribed with the hand and name of one *Abraham Goodrich*, by procuration of the said *Livesey, Hargreave, and Co.* according to the usage and custom of merchants, appointed the said sum of money, in the said last mentioned bill of exchange contained, to be paid to the said *Hughes and James Peter*, and then and there delivered the said last mentioned bill of exchange, so indorsed as aforesaid, and also having the name of *John White* indorsed upon the same, to the said *Hughes and James Peter*; which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said *Thomas Gibson and Joseph Johnson* for their acceptance thereof; and the said *Thomas Gibson and Joseph Johnson*, then and there, according to the usage and custom of merchants, accepted the same: By reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson and Joseph Johnson* became liable to pay to the said *Hughes and James Peter* the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said *Thomas Gibson and Joseph Johnson*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Hughes and James Peter* then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid. And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership, name, and firm of *Livesey, Hargreave, and Co.* on the said 18th day of *February*, in the said year of our Lord 1788, at *Manchester*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership, name, and firm, to wit, *Livesey, Hargreave, and Co.* being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson and Joseph Johnson*, by the names and description of *Messrs. Gibson and Johnson, bankers, London*; and

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geth count,
on which
judgment
was given for
the defend-
ants in error.

and thereby requested them the said *Thomas Gibson* and *Joseph Johnson*, three months after date, to pay *Mr. John White*, or order, 721 l. 5 s. value received, with or without advice; and then and there delivered the said bill of exchange to the said *John White*; and the said *John White* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said bill of exchange; and by that indorsement appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said *Hughes* and *James Peter*, and then and there delivered the said last mentioned bill of exchange so indorsed to the said *Hughes* and *James Peter*; which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said *Thomas Gibson* and *Joseph Johnson*, for their acceptance thereof; and the said *Thomas Gibson* and *Joseph Johnson*, then and there, according to the usage and custom of merchants, accepted the same: By reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson* and *Joseph Johnson* became liable to pay to the said *Hughes* and *James Peter* the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as last aforesaid. And being so liable, they the said *Thomas Gibson* and *Joseph Johnson*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and to the said *Hughes* and *James Peter* then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as last aforesaid. And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership, name, and firm of *Livesey, Hargreave, and Co.* on the said 18th day of *February*, in the said year of our Lord 1788, at *Manchester*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said co-partners on their joint account and in their said co-partnership, name, and firm, to wit, *Livesey, Hargreave, and Co.* being thereunto subscribed, bearing date the same day and year aforesaid.

aforesaid, and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*: and thereby required them the said *Thomas Gibson* and *Joseph Johnson*, three months after date to pay to the bearer of the said last mentioned bill, 721 l. 5 s. value received, with or without advice: And the said *Hughes* and *James Peter* in fact say, that afterwards, and before any payment of the said last mentioned bill of exchange, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, they the said *Hughes* and *James Peter* became and were the bearers and owners of the said last mentioned bill of exchange; of which last mentioned premises the said *Thomas* and *Joseph* then and there had notice. And the said *Hughes* and *James Peter* further say, that afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, the said last mentioned bill of exchange was presented and shewn to the said *Thomas* and *Joseph*, who thereupon then and there duly accepted the same, according to the usage and custom of merchants aforesaid: By reason whereof, and according to the usage and custom of merchants, the said *Thomas* and *Joseph* became liable to pay to the said *Hughes* and *James Peter* the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill. And being so liable, they the said *Thomas* and *Joseph*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Hughes* and *James Peter* then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same last mentioned bill of exchange. And whereas also, the said persons

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persons, on the said 18th day of *February* in the year of our Lord 1788 aforesaid, at *Manchester*, to wit, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said last mentioned co-partners on their joint account and in their co-partnership name and firm of *Livesey, Hargreave, and Co.* being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last mentioned bill of exchange to the said *Thomas Gibson and Joseph Johnson* by the names and description of Messrs. *Gibson and Johnson*, bankers, *London*; and thereby required the said *Thomas Gibson and Joseph Johnson*, three months after date, to pay to them the said last mentioned co-partners by the name of *Mr. John White, or order*, 721*l.* 5*s.* value received, with or without advice. And the said last mentioned co-partners, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing, by them made upon the said last mentioned bill of exchange according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained to be paid to the said *Hughes and James Peter*, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid to the said *Hughes and James Peter*: which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said *Thomas Gibson and Joseph Johnson*, for their acceptance thereof: And the said *Thomas Gibson and Joseph Johnson* then and there, according to the usage and custom of merchants, accepted the same: By reason whereof, and by force of the usage and custom of merchants, the said *Thomas Gibson and Joseph Johnson* became liable to pay the said *Hughes and James Peter*, the said sum of money in the said last mentioned bill of exchange contained according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said *Thomas Gibson and Joseph Johnson*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, at the parish and ward aforesaid, undertook, and to the said *Hughes and James Peter* then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of

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exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

The eighth count was for money had and received. The ninth for money paid, laid out, and expended. The tenth for money lent and advanced.

Plea. *Non assumpsit*, on which issue was joined. This issue was tried at *Guildhall*, Nov. 3, 1789, by a special jury before Lord *Kenyon*, when a verdict was found for the plaintiffs.

A motion was afterwards made in the court of King's Bench, by *Erskine* for a new trial, which was withdrawn, it being agreed on both sides that the following special verdict should be put upon the record, for the purpose of having the question finally decided in the House of Lords (a).

Special ver-
dict.

That the said persons using trade and commerce as co-partners, in the co-partnership name and firm of *Livesey, Hargreave, and Co.* on the 18th day of *February* 1788, at the place within-named, made a certain instrument in writing, (the hand of one of the said co-partners, on their joint account, and in their co-partnership name and firm of *Livesey, Hargreave, and Co.* being thereunto subscribed,) and directed the same instrument to the said *Thomas Gibson* and *Joseph Johnson*, by the names and description of Messrs. *Gibson* and *Johnson*, bankers, *London*; and which said instrument is in the words and figures following, to wit:

Manchester, Feb. 18, 1788.

£. 721. 5s.

Three months after date, pay to Mr. *John White*, or order, seven hundred twenty-one pounds five shillings, value received, with or without advice.

Livesey, Hargreave, and Co.

To Messrs. *Gibson* and *Johnson*,

Bankers,

London.

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And the jurors aforesaid, upon their oaths aforesaid, further say, That the said *Livesey, Hargreave, and Co.* at the time of making the said instrument, well knew that no such person as *John White*, in the said instrument mentioned, existed. And the jurors aforesaid, upon their oaths aforesaid, further say, that afterwards, at the day and place within mentioned, a certain indorsement in writing was made by the said *Livesey, Hargreave, and Co.* upon

(a) See 3 Term Rep. B. R. 483.

the said instrument, purporting to be the indorsement of *John White* named therein, and to be subscribed with his hand and name: And that the said indorsement purported to require the said sum of money in the said instrument contained, to be paid to the said *Livesey, Hargreave, and Co. or their order*. And the jurors aforesaid, upon their said oaths further say, that the said instrument being so indorsed as aforesaid, they, the said *Livesey, Hargreave, and Co.* afterwards, at the day and place within named, by a certain indorsement in writing made upon the said instrument, and subscribed with the hand and name of one *Abraham Goodrich*, by procuration of the said *Livesey, Hargreave, and Co.* appointed the said sum of money in the said instrument contained, to be paid to the said *Hughes Minet and James Peter Feltor*; and then and there delivered the same so indorsed, as well with the name of the said *John White*, as with the name of the said *Abraham Goodrich*, to the said *Hughes Minet and James Peter Feltor*, for a full and valuable consideration in money therefore, then, and there paid by the said *Hughes Minet and James Peter Feltor* to the said *Livesey, Hargreave, and Co.* And the said *Hughes Minet and James Peter Feltor*, then and there became, and were, and still are, the holders of the said instrument. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said instrument was afterwards, at the day and place within mentioned, presented to the said *Thomas Gibson and Joseph Johnson*, for their acceptance thereof, and that the said *Thomas Gibson and Joseph Johnson* then and there accepted the same; they the said *Thomas Gibson and Joseph Johnson* then and there well knowing that no such person as *John White*, in the said instrument named, existed: and that the name of *John White* so indorsed thereon, was not the hand-writing of any person of that name. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said *Thomas Gibson and Joseph Johnson*, at the time of making and accepting of the said instrument as aforesaid, had not, nor had they, at any time since, any money, goods, or effects whatsoever, of, or belonging to the said *Livesey, Hargreave, and Co.* or of the said *Hughes Minet and James Peter Feltor*, in their hands. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said *Thomas Gibson and Joseph Johnson*, although often requested, have not paid the said sum of money contained in the said instrument, or any part thereof, to the said *Hughes Minet and James Peter Feltor*, or either of them, and that the same

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still remains unpaid; but whether upon the whole matter aforesaid, found by the said jurors in manner aforesaid, the said *Thomas Gibson* and *Joseph Johnson* are liable to the payment of the said sum of money in the said instrument mentioned, or not, the said jurors are altogether ignorant, and pray the advice of the court here in the premises. And if upon the whole matter aforesaid, found by the said jurors in manner aforesaid, it shall appear to the court here, that the said *Thomas Gibson* and *Joseph Johnson* are liable to the payment of the said sum of money in the said instrument mentioned, then the said jurors upon their oaths say, that the said *Thomas Gibson* and *Joseph Johnson* did undertake and promise in manner and form as the said *Hughes Minet* and *James Peter Feetor*, by their declaration have declared against them. And they assess the damages of the said *Hughes Minet* and *James Peter Feetor*, on occasion of their not performing the promises and undertakings within specified, over and above their costs and charges, by them about their suit in that behalf expended, to 721 l. 5 s. And for those costs and charges to 40 s. But if from the whole matter found by the jurors, in manner aforesaid, it shall appear to the court here, that the said *Thomas Gibson* and *Joseph Johnson* are not liable to the payment of the said sum of money in the said instrument mentioned, then the said jurors upon their oaths say, that the said *Thomas Gibson* and *Joseph Johnson* did not promise and undertake in manner and form as they have within by their plea alleged.

In *Michaelmas* term, Nov. 24, 1789, the court of King's Bench gave judgment on this special verdict for the plaintiffs upon the fifth count of the declaration*, and for the defendants on the other counts (a).

* [Stating the bill to be payable to bearer.]

Upon this judgment a writ of error was brought, returnable in parliament; and the plaintiffs in error having assigned general errors, and the defendants in error having pleaded that there was no error in the record of the proceedings, the plaintiffs in error hoped that the said judgment would be reversed, for the following, (among other) REASONS.

Reasons of the plaintiffs in error.

First, Because by the law and custom of merchants there are two species of negotiable instruments or bills of exchange, essentially different in their natures, the one payable to order, and the other to bearer; the former being only negotiable by indorsement, and the property in the latter being transferrable by mere delivery.

(a) 3 Term Rep. R. R. 481.

Second, Because instruments of this description are in the nature of specialties, and are by law permitted to be declared upon as such; and the count upon which the court have given judgment, setting forth and stating a bill payable to bearer, when the bill or instrument produced in evidence purports to be a bill payable to order, is not supported by the evidence.

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Third, Because the legal effect of every instrument must arise out of, and be collected from, the words of it, and no parol evidence or extrinsic circumstances can give to it a meaning or operation contrary to, or different from, that which appears on the face of the instrument itself.

Fourth, Because, in the case of instruments the property of which passes by indorsement, it is peculiarly necessary that there should be persons in existence, answering to the names indorsed upon such instruments, inasmuch as additional credit is derived to them from the number of indorsements made upon them, the consequent appearance of their having passed through an extensive circulation, and the apparent liability therefore of a greater number of persons to the payment of the money contained in them.

Fifth, Because the facts found by the jury amount to the statement of a fraud and forgery, which can never give legal effect to an instrument, nor be the foundation of a contract within the custom of merchants; which custom must be founded in convenience, be consistent with reason, and sanctioned by usage: And consequently, as the count on which the judgment for the defendants in error is given, declares on a bill drawn according to the usage and custom of merchants, the evidence does not support such declaration.

Sixth, Because, judgment being given for the plaintiffs in error, on those counts which specially state the circumstances that have been found by the jury, it follows, that they are entitled to it on that count, to the support of which, the facts so found are the only evidence; otherwise it must be decided, that a transaction, which stated upon the record in an action upon the case, is not sufficient to found a contract, or to make the party charged liable, will, when found specially by a jury, and put upon the record in the shape of a special verdict, be sufficient to found a contract, and to support a count stating a contract of a different nature.

T. Erskine:

F. Bower.

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Reasons of
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ants in error.

The defendants in error hoped that the judgment of the court of King's Bench would be affirmed, with costs, for the following, (among other) REASONS:

First, It appears by the special verdict, that the defendants in error are fair *bonâ fide* holders of the bill in question, for a valuable consideration; and *Livesey, Hargreave*, and Co. the drawers, at the time when they drew the bill, as well as the plaintiffs in error, Messrs. *Gibson* and *Johnson*, when they accepted it, are found to have been perfectly informed of the non-existence of *White*, to whom, or to whose order, the form of the bill makes the contents of it payable. The defendants in error, therefore, are in a situation which intitles them to all the aid which, consistently with established legal principles, can be given by a court of justice: And the plaintiffs in error having acted under no mistake or misrepresentation, and not being in any respect interested in the existence or non-existence of *White*, have no equitable claim to be released from the effect of their engagement, or to prevent the application of any favourable rule of construction to support the demand of the defendants in error.

Second, It is not necessary to the validity of deeds or contracts, that they can in all cases operate according to the words in which they are expressed*; when the rules of law prevent such operation, the instrument may legally operate in a different manner, to give effect to the legal intent of contracting parties. Thus words of demise may operate by way of confirmation, and *vice versa* (a): words of grant by way of covenant; and so in many similar instances. The intent of the drawers and acceptors of the bill in question was to make a negotiable instrument, and if, for want of an actually existing payee, nominated in the bill, it could not be so indorsed as to be put into a state of negotiability by indorsement, it is humbly conceived that there is no rule of law to prevent its being transferred by delivery, and having the effect of a bill expressed to be made payable to bearer, that being the only other method of negotiating bills of exchange: and it is also conceived that the fifth count of the declaration, which states the bill according to its legal effect and operation, is properly adapted to the case, and that the judgment thereon is warranted by the verdict. By thus giving effect to the bill justice is done betwixt the parties, and the rule affords protection to the fair holder of bills of exchange, against frauds, by

* [See *Collis v. Emmett*, ante, 120. Lord Loughborough's opinion.]

(a) Co. Lit. 45. a. Viner, tit. Grants (1).

which

which they might otherwise be injured ; without which protection the currency of bills of exchange would be greatly obstructed, and great inconveniences would arise in commercial transactions.

Third, It is objected, that the defendants in error make title to the bill through the medium of a felony ; but supposing the indorsement of the name of *White* to have been a felonious act, the present action is not brought against the person who committed the felony, or for the felonious act ; and it has been decided (*a*), that the *bonâ fide* holder of a stolen bill of exchange might maintain an action upon the bill, though it had been negotiated to him through the hands of the person who stole it. In the present case, however, the question does not arise ; for the verdict finds no intent to defraud ; and consequently no felony is found, nor can be intended.

E. Bearcroft,

J. Mingay,

A. Chambre.

This case was argued at the bar of the House by *Erskine* and *Bower*, for the plaintiffs in error, and by *Bearcroft*, *Mingay* and *Chambre*, on behalf of the defendants in error.

After which, on the 26th of *April* 1790, the following questions were put to the judges :

I. Whether the making of the instrument declared upon, appears upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such an instrument ?

II. Whether, upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer ?

III. Whether the matter of the special verdict will sustain any other count in the declaration ?

On the 3d of *February* 1791 the judges thus delivered their respective opinions :

HOTHAM, Baron.—In answer to the first question proposed to us, “ Whether the making the instrument declared upon “ appears to be so criminal that the policy of the law will not “ suffer an action to be founded upon such instrument ? ” I am of opinion that no such criminality can be distinctly inferred from this verdict,

To constitute that degree of criminality, the facts found must amount to this, that the parties have uttered the bill or have

(*a*) *Peacock v. Rhodes* and another, *Dougl.* 632. 8vo.

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forged it with intent to defraud some person in particular. Now, in the first place, acceptance does not import, *ex vi termini*, an utterance. Acceptance may be by writing or by parol. If it be by parol, it would be difficult to maintain *that* to be such an utterance as would amount to the crime supposed; and if it would not, it seems extremely questionable, Whether on any principle the mode of acceptance can change the colour of the act? It is true that the refusal to pay may afford a strong presumption of the original intent; and yet that fact standing alone can hardly be decisive. It may admit of different interpretations; and if by any fair reasoning it can receive an innocent construction, that will always be presumed, unless it be excluded by the finding of the jury. As to the bare writing of the name of a non-existing person, that will not amount to a forgery unless some representation be made to give the instrument effect and operation; whereas it is not found by this verdict that any such representation was made. It is necessary, therefore, for the jury to do more than merely to find the insertion of a false name in the instrument: of itself that is no crime; but it becomes one by being done with a design of defrauding some person in particular. But in this special verdict so far from that being found, it is neither found nor alleged that there was an intention to defraud any person. That I take to be a radical and insurmountable defect in the special verdict; and therefore that enough does not appear upon it to warrant the House in saying, that the facts found amount necessarily to a felony; without which the making of the instrument declared upon is not so criminal, as that the policy of the law will not suffer an action to be founded upon it.

With regard to the second question, "Whether upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill *payable to bearer*?" it is impossible to lay out of the case any of the facts stated in the declaration, and found by the special verdict; the answer to this question must embrace them all. It is equally impossible not to feel that the plaintiffs in error avow themselves to be in this situation, namely, of palpably endeavouring to avail themselves of their own fraud: an attempt which the law will in no case endure, much less assist. Unless, therefore, some stubborn rule of law stand in the way of the present judgment of the court of King's Bench, it ought to be supported; and I am of opinion that no such rule does impeach it. It is admitted that many cases

cases may be put, such as are mentioned in *Co. Lit.* 45. *a.* and in many other books, in which deeds and solemn instruments are not always to be construed or to have effect according to their technical or literal import, but that they shall have such an operation as will carry the intent of the parties into execution, though contrary to the strict letter of the instrument themselves. That principle will, in my apprehension, apply directly to the present case. The bill in question, on the face of it, imports to be a bill of exchange payable to *John White* or his order; but in truth and in fact it is not so, it never was, nor ever can be so, because there is no such person existing as *John White*, which is found to be a fact known to the acceptors as well as to the drawers. Is then the bill so vitiated as, (contrary to the principle which operates on deeds and other instruments,) to lose all its efficacy and become mere waste paper? To answer that question we must resort to what the law never overlooks, the intention of the parties, which in the present case was clearly otherwise. The plaintiffs in error, as well as *Livesey* and Co., meant to give the bill a credit by the acceptance, and to put it into circulation; and they all thought the most convenient way of doing it was by inserting in it this fictitious name. It having been found then, that the plaintiffs in error knew at the time of their acceptance, that the name of *John White* was a mere fiction, they must be presumed to have known more, namely, that no regular or formal title could ever be traced through him by any holder of the bill. If, therefore, they have accepted a bill, which they knew was so framed as to be incapable of being proved in the shape it bore, they shall nevertheless be held to their undertaking to pay it, though it be presented to them in another, because they themselves have induced such necessity; for it is a known rule of law, that no man shall take advantage of his own wrong.

— *Nec lex est justior ulla,*

Quam neqis artifices arte perire suâ.

It is impossible not to consider the drawers and acceptors here as one and the same, linked together for the purpose of giving colour and effect to this fraudulent transaction. The difficulty on the form of the bill arises from no mistake or accident, but from the deliberate and concerted act of the acceptors as well as the drawers. But it is still in their power to give effect to the bill; Shall they not then be obliged to do so? Perhaps it may not be too much to say, that on this finding a presumption will arise that the intention of the acceptors was, that it should be payable

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to the bearer; for they knew that the bill, virtually, had no indorsement upon it by *John White*; they knew that it came into the hands of *Minet* and *Fector* by the delivery of *Livesey* and Co. and that in truth, whatever semblance it bore, it was nothing but a bill payable to bearer. I contend that it is not competent to these partners in the fraud to say, "it is true we did accept the bill, but we meant nothing by that acceptance but to cheat all mankind, let the bill get into what hands it might." As little shall they be permitted to say, after having fabricated this paper, that it is not according to the law and custom of merchants, which I conceive will attach on the bill, notwithstanding the fraud used in its original formation. The great principle that I go upon is, that parties to a bill shall not, any more than parties to any deed or instrument, take advantage of their own fraud. In truth, What is the end and effect of acceptance but a liability to pay? The acceptors having given this bill a currency when they knew that it never could be paid to the order of *White*, the law will presume that they intend that formality should be waived. If it be waived, what does it remain but a bill payable to bearer? Knowing that it was *impossible* to pay it in the shape it bore, they accepted it, but knowing at the same time that it was *possible* to pay it in another. The law will conclude then that such was their intent; and I conceive that such a construction will be most conformable to the policy which affects, that the principles which operate on all commercial transactions. That policy and those principles are bottomed in liberality. Bargains shall be enforced, undertakings shall be executed, and promises to pay shall be performed. The rule of law, that a man's own acts shall be taken most strongly against himself, obtains not only in grants, but extends in principle to all other engagements and undertakings. I conceive, therefore, that the acceptors of this bill shall not be heard to say in a court of justice, that as they never *intended* to pay it, so because they have inserted *White's* name in it, they never shall be *compelled* to pay it. On the contrary, the law will hold them more strictly to a compliance with their engagement, on the single ground of their own fraud, and will, therefore, still consider the bill as capable of transfer by delivery. A bill of exchange, in its own nature, amounts to nothing more than an authority on one hand, to pay to the order of the person to whom it is made payable, and on the other, to an undertaking on the part of the acceptor that he will pay it. By this acceptance he puts himself into a situation that makes it obligatory on him to pay the bill, either

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in the very terms of it, or as nearly as possible to its literal import; and as soon as he has made himself the principal debtor for the sum contained in it, the law raises a presumption against him. But the presumption here cannot be that the acceptors will pay it to the order of *White*, because the fact found makes that to be impossible, and impossible in their own knowledge. The name of *John White* then must be considered as if it were not on the bill at all, as no name, as a mere non-entity. To whom then must the presumption arise that it was intended to be payable, but to the only person it could, namely to the bearer? And I am of opinion, that the great ends of circulation, the support of credit, and the extension of commerce, would be in constant danger of fatal checks, if bills were permitted to be so made as to enable confederate acceptors to set up their own fraud, as a justification for refusing payment to a fair and honest holder of them for a *bond fide* valuable consideration, which these defendants are found to have given. On this question therefore I am of opinion, that upon the matter found in the special verdict, the bill mentioned in the 5th count may be deemed in law a bill payable to bearer. But if the bill cannot be sustained as a bill payable to bearer, then on the third question,

“Whether the matter of the special verdict will sustain any other count in the declaration?” I am of opinion that it will also sustain the *first*, by considering the bill as a new bill from the time of the subsequent indorsement of *Livesey* and Co. For every indorser charges himself in the same manner as if he had originally drawn the bill. From the moment therefore of that second indorsement by their procuration, they gave the plaintiffs a new title to the bill, and they gave a fresh authority to *Gibson* and *Johnson*, namely, to pay it to their own order; and to that authority *Gibson* and *Johnson* must be taken to have acceded, because it is expressly found that their acceptance was subsequent to such indorsement; which acceptance then made must be coupled with the knowledge, which they are found to have had, of the antecedent fiction. I conceive therefore that having accepted it after *Livesey* and Co. had so indorsed it, and knowing at the same time that although there was on the bill a fictitious indorsement, there was also a real one, the law will presume them to have given credit to *that*, and thereby to have accepted a good and valid bill. In this view of it, I consider them as liable to pay the bill under the first count in the declaration, which I am of opinion may also be sustained by the special verdict.

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PERRY, Baron.—With respect to the first question, namely, Whether the making of the instrument declared upon appears upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such instrument? The law where a felony has been committed, will not permit the party injured to proceed against the offender in a civil suit, but for the sake of the public he must seek his remedy by a criminal prosecution, and the civil action shall merge in the felony. This is certainly so against the person who commits the felony. The main ingredient to constitute the crime of forgery is an intention to defraud; it must be so laid in the indictment and proved. In the cases of *Wilkes* at *Launceston* (a), *Tuft's* (b) case and *Bodland's* (c) case cited at the bar, there was a false representation made, a false name put upon the several bills in each case, and in all an intention to defraud particular persons was charged expressly and found. Putting a fictitious person's name on a bill of exchange, will not, I conceive, amount to felony, unless done with intent to defraud; and I believe it has not been an unusual practice amongst merchants, to draw bills in favour of fictitious payees without any intention to defraud. But however that may be, it does not appear, nor is it found by the special verdict, that there was in this case an intention to defraud; that, as I think, ought to have been found as a fact by the verdict to merge the civil action; and therefore I am of opinion, that the making of the instrument declared upon, does not appear upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be brought on such instrument.

As to the second question, viz. Whether upon the matter found in the special verdict, the bill mentioned in the 5th count can be deemed in law a bill payable to bearer? These facts appear in the special verdict; that the name of *John White* indorsed on the bill, was done by the drawers previous to the receiving the full value from the defendants in error; that *Gibson* and *Johnson* afterwards, with full knowledge that *John White* was a non-entity, and that no person with that name had indorsed the bill, accepted it. This circumstance being known to the acceptors,

(a) In this case one *Wilkes* drew a bill in a fictitious name upon a fictitious drawer, in favour of a real payee in payment for goods sold. He was first indicted for the cheat at *Launceston*, and acquitted. The case being stated to the judges, they were all of opinion that the transaction was a forgery within stat. 2 Geo. 2. c. 25. He was afterwards indicted again for forgery, having drawn another bill under the same circumstances, and tried before Mr. Justice Yates at *Bodmin*, August 1767, but again acquitted.

(b) *Leach's Crown Law*, 182.

(c) *Ibid.* 83.

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there was no imposition upon them, they have with their eyes open ratified and confirmed the acts of the drawers, guaranteed the payment of the bill, and undertaken to discharge it. In the case of drawing bills of exchange to the order of a fictitious payee, the drawer and acceptor, knowing the fact, have no reason to complain of any injury to them. The acceptor, either upon the credit, or for the honour of the drawer, engages to pay the bill when due, and can never be discharged from that engagement except by satisfying the bill, which if he once does to the *bonâ fide* holder, he can run no risk of any claim from a fictitious payee. Every person whose real name and signature appears on a bill of exchange, is responsible to the extent of the credit he gives to it in the negotiation of it. It is contrary to justice, and not to be endured, that fraudulent drawers and acceptors should receive benefit by their own acts, and their estates be exonerated from the demands of their just creditors. The claim of the defendants in error certainly in justice and equity ought to be supported, and I think it may in law be maintained upon the 5th count, as on a bill *payable to bearer*. The intent of the drawers and acceptors of the bill seems to be, to have made a negotiable instrument; and if for any defect, it cannot be made so by indorsement, it is reasonable it should be made valid in any way in which that effect can be produced: and there does not occur to me any rule of law to prevent its being made good *by delivery*. If a bill be made payable to a person not existing, it operates as a bill payable to bearer. Where the bill is in the hands of a purchaser for a full and valuable consideration *bonâ fide*, and the acceptor, before his acceptance, is privy to the non-existence of the payee, and who cannot give an order, it is in effect and in point of law the same thing as if made payable to the *holder*, namely, the *bearer*. Many instruments may be enforced contrary to the words, *Co. Litt. 45. a. 301. b.* words of demise may operate as a grant, covenant to stand seised, confirmation, and in other ways: at one time they may operate as a lease, at another time as a confirmation, in order to preserve right and do justice, the law being anxious and astute to obtain those purposes. In the case of *Stone v. Freeland*, cited 3 *Term Rep. B. R.* 176. (a) Lord *Mansfield* said, in bills of exchange names of payees were often used of persons not having existence, and such bills indorsed by the drawer; and with knowledge of that fact a bill is accepted and put in circulation, it shall not

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(a) *Vide ante*, 316. a note of that case.

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lie in the acceptor's mouth to say, the bill is a bad one. And in that case Lord *Mansfield* held, that the acceptor was liable, though there was a fictitious payee, and that such acceptor should not be at liberty to deny the validity of the bill, which by lending his acceptance he had put in circulation. In *Peacock v. Rhodes*, Dougl. 632. Lord *Mansfield* in giving the opinion of the court, said, "the law was settled, that the holder of a bill coming fairly by it, has nothing to do with the transaction between the original parties, except in the single case of a note for money won at play." *Price v. Neale*, 3 Burr. 1354. was the case of a forged bill, which had been accepted and paid to the defendant in the course of trade; there Lord *Mansfield* held, that the acceptor having given credit to it by his acceptance, should not recover back what he had paid to a *bonâ fide* holder. In *Collis v. Emmett*, Term Rep. C. P. 313. (a) where a bill was made payable to a fictitious payee or order, it was holden that the indorsee might maintain an action against the drawer, as on a bill payable to bearer. Under the circumstances stated in this special verdict, I see no distinction that can be made between the drawer and acceptor of such bill. The bill indeed in this case, as in *Collis v. Emmett*, is payable to *John White* or order, but before the plaintiffs in error accepted it, they knew that *John White* was not in existence, and could not make an order: the indorsees ignorant of that fact, pay a full value for the bill; the acceptors have, by lending their name, given circulation to the bill, and have as I conceive, undertaken to pay the bill to such person as shall be the *bonâ fide* holder: their engagement is to pay the bill, in any way in which it can take effect. Upon the whole therefore I concur with the judgment of both the courts of King's Bench and Common Pleas, and my answer to the second question is, that upon the matter found in the special verdict, the bill mentioned in the 5th count may be deemed in law a bill payable to bearer.

The third question is, Whether the verdict can be sustained upon any other count in the declaration? If the verdict could not be supported on the fifth, I conceived it may be sustained upon the first count in the declaration, and that this transaction will stand, or may be considered in this way, viz. that by *Liversey* and Co. making the bill payable to *John White* or order, there being no such person existing by that name, they have themselves assumed and taken the name of *White*, for the purpose of indorsing and negotiating the bill, with the consent and by the

(a) *Ante*, 313.

authority of the persons, who afterwards, knowing the fact accepted the bill; that this was truly and substantially making the bill payable to *their own order*, and that the case may be considered as if every thing respecting *John White* and order, so far as regards the drawers and acceptors, was struck out of the bill, and that by the indorsement by *Livesey* and Co. it will operate as a new bill. *Salk.* 125. Upon the third question, therefore, the best opinion I can form is, that the verdict may be sustained upon the *first*, as well as upon the fifth count of the declaration.

THOMPSON, Baron.—Before I proceed to state the questions which have been proposed to the judges, it may be proper to recal the attention of the house to the declaration in this case, and to the facts disclosed in the special verdict. This is an action of *assumpsit*. The first count of the declaration states, that certain persons carrying on trade as parties under the firm of *Livesey* and Co. on the 18th of *February* 1788, according to the custom of merchants made a bill of exchange, directed to the defendants *Gibson* and *Johnson*, requiring them three months after date, to pay 721 l. 5s. to *John White* or order, value received, *Livesey* and Co. well knowing that no such person as *John White* existed; upon which bill an indorsement was afterwards made, purporting to be the indorsement of *John White* named in the bill, and to be subscribed by him, and purporting to require the contents to be paid to *Livesey* and Co. or order; that *Livesey* and Co. afterwards (by indorsement on the bill subscribed by one *Abraham Goodrich*, by procuration of *Livesey* and Co.) appointed the money contained in the bill to be paid to the plaintiffs, and delivered the bill so indorsed to them, and that the defendants afterwards accepted the bill, they well knowing that no such person as *John White* named in the bill existed, and that the name of *John White* so indorsed, was not the hand-writing of any person of that name.

The second count, after stating the drawing of the bill as above, “ added *Livesey* and Co. well knowing that *John White* “ was not a person dealing with, or known to *Livesey* and Co. “ and using the name of *John White* in the bill as a nominal “ person only, and intending not to deliver the same to him, or “ to procure the same to be actually indorsed by him. Upon “ which bill a certain indorsement was made purporting to be “ the indorsement of *John White*, requiring the payment to be “ made to *Livesey* and Co. or order; and that *Livesey* and Co. “ indorsed and delivered the bill to the plaintiffs, without having

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The third count states, that the bill was made payable to themselves *Livesey* and Co. by the name and description of *John White*.

The fourth count states it is a common bill payable to *John White* or order, and that *John White* indorsed it to the plaintiffs.

The fifth count states the bill as payable to bearer, and that the plaintiffs were the bearers: on which judgment has been given for defendants in error.

The sixth count states it as payable to *John White* or order, with an averment that when the bill was made, there was no such person as *John White* the supposed payee, but that the name was merely fictitious; by reason whereof the sum mentioned in the bill became and was payable to the bearer thereof, according to the effect and meaning of the bill; averring also that the plaintiffs were the bearers and proprietors thereof.

The seventh count states that there was a partnership of certain persons using trade, as well in the name and firm of *Livesey* and Co. as in the name and firm of *John White*; that the last mentioned persons made the bill, (the hand of one of them on their joint account, and their co-partnership name and firm of *Livesey* and Co. being thereunto subscribed,) and directed it to the defendants, requiring them three months after date, to pay to the said last mentioned co-partners by the name of *John White* or order, 721 l. 5 s. and that the said last mentioned co-partners afterwards, by a certain indorsement in writing appointed the contents to be paid to the plaintiffs, and delivered the bill so indorsed to them, &c. The other counts are for money had and received by the defendants to the plaintiffs; for money paid, laid out, and expended by the plaintiffs to the use of the defendants; and for money lent and advanced by the plaintiffs to the defendants.

The defendants having pleaded the general issue, the jury have found a special verdict to this effect; That *Livesey, Hargreave*, and Co. on the 18th day of *February* 1788, made a certain instrument in writing with their partnership name subscribed, directed to the defendants, (and which is set out in the words,) requiring them three months after date, to pay to *John White* or order, 721 l. 5 s. value received: That *Livesey* and Co. at the time of making it, well knew that no such person as *John White* in the instrument mentioned existed.

That

That an indorsement was afterwards made by *Livesey* and Co. on the instrument, purporting to be the indorsement of *John White* named therein, and requiring the money contained in the instrument, to be paid to *Livesey* and Co. or their order; that *Livesey* and Co. afterwards, by an indorsement on the instrument, subscribed by *Abraham Goodrich*, by procuration of *Livesey* and Co. appointed the money to be paid to the plaintiffs, and delivered the bill so indorsed to the plaintiffs, for a full and valuable consideration in money, and that the plaintiffs became and still are the holders of the instrument: That the instrument was afterwards accepted by the defendants, they well knowing that no such person as *John White* named in the instrument existed, and that the name of *John White* indorsed thereon, was not the hand-writing of any person of that name. The verdict then finds that *Gibson* and *Johnson*, at the time of making and accepting the instrument, had not, nor had they, at any time since, any money, goods, or effects whatsoever, belonging to *Livesey* and Co. or to *Minet* and *Fellor* in their hands, and that *Gibson* and *Johnson* have not paid the bill. Upon this special verdict the court of King's Bench has given judgment for the plaintiffs below the now defendants in error, upon the fifth count of the declaration, and for the plaintiffs in error on the other counts. And your Lordships having heard the arguments, have been pleased to propose the following questions to the judges:

1st. Whether the making of the instrument declared upon appears upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded upon such instrument?

2dly. Whether upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer?

3dly. Whether the matter of the special verdict will sustain any other count in the declaration?

The first question proposed, does not proceed on any objection to the form of this particular action, but to the maintaining of any action whatsoever against *Gibson* and *Johnson*, in respect of the bill in question, supposing that there may have been disclosed by the special verdict such a degree of criminality on the part of *Gibson* and *Johnson*, in the share they have had in the transaction relating to this bill, as is sufficient to involve them in the guilt of felony, and consequently such as calls for a public prosecution, instead of a private action by the party

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1791. complaining of the breach of a contract so constituted. Undoubtedly there have been cases, in which the indorsement of a fictitious name upon a bill of exchange has been determined to be a forgery; for it is not essential to constitute that crime, that there should be a person in existence whose name is forged, though it is essential that it should be done with intent to defraud some person, who must be particularly specified. In the present case, there is nothing stated by the verdict to charge *Gibson* and *Johnson* with the fact of assisting *Livesey* and Co. in the false making or counterfeiting this indorsement, even supposing it had been expressly found to have been done by *Livesey* and Co. with intent to defraud *Minet* and *Fellor*. If therefore there is any ground for imputing to *Gibson* and *Johnson* a felony in respect of this bill, it must be the offence and uttering and publishing the indorsement knowing it to be forged. I am at present by no means prepared to say, that the mere undertaking of a man to pay a bill drawn upon him by his correspondent in favour of a person who has no existence, is of itself an uttering and publishing of the indorsement knowing it to be forged, within the meaning of the statute. But whatever may be the determination of such a case, if ever it should come before a court of criminal judicature, the question cannot arise unless the fact be stated to be committed with intent to defraud some particular person, which is not the present case. And indeed it here appears, that *Minet* and *Fellor* had parted with their money to *Livesey* and Co. for the bill, before it was accepted by *Gibson* and *Johnson*. If therefore this preliminary objection to the plaintiff's cause of action be not well founded, which I conceive it not to be, it is next to be considered, Whether this action can be maintained on the fifth count of the declaration, which treats the bill as payable to the bearer, and deduces a title to the plaintiffs in the action, in that character, on which count judgment has been given for them by the court of King's Bench. To consider the bill in question as a bill payable to bearer, is undoubtedly to treat it as an instrument in a different form from that in which it appears; and yet it is certain that the bill is not in reality what it imports to be. The construction which has been put upon this instrument by the court below, is that which will give effect to it, and compel the defendants there to do, what in justice they are bound to do, viz. to make good the engagement they entered into by accepting the bill; viz. to pay the amount of it. In order to support this construction, recourse must be had to the facts disclosed

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disclosed by the special verdict ; and there it appears that *Livesey* and Co. when they made, and *Gibson* and *Johnson* when they accepted the bill, knew that there was no such person as *John White*, the supposed payee of the bill, in existence, to receive the money or authorize any other person by indorsement to receive it, and that the bill was incapable of being negotiated in that form. But it was meant to be a negotiable bill of exchange, and has actually been delivered for a valuable consideration ; and therefore to give effect to it, and to what we must take to be the intention of the parties, it seems requisite to construe it (as between those parties) a bill payable to bearer, and consequently assignable by the delivery which has taken place. It is clear, (as was said by the court of King's Bench in giving judgment in the case of (a) *Tatlock v. Harris*, in *Easter* term 1789,) that many instruments may be enforced contrary to the wording of them ; as if *B.* tenant for the life of *C.* and he in remainder or reversion in fee having several estates in the same land, join in the same lease by deed ; during the life of *C.* it shall be considered as the lease of *B.* and confirmation of him in reversion or remainder, and after the death of *C.* it is the lease of the remainder man and the confirmation of *B.* according to *Co. Lit.* 45. a. The case of *Collis v. Emmett* determined by the court of Common Pleas in *Hilary* term 1790, which is reported in the (b) *Term Reports* of that court, and which has been referred to in the argument, appears to have been decided on the same principle with the present case. There the defendant wrote his name on a blank paper, and delivered it to *Livesey* and Co. for the purpose of drawing a bill of exchange for such sum and payable to such person as they should think fit. *Livesey* and Co. drew a bill on the paper over the defendant's name, for 1551 l. upon themselves, payable to *George Chapman* or order, which a clerk of *Livesey* and Co. accepted for them ; and with the authority of *Livesey* and Co. the name of *George Chapman* was indorsed upon the paper. This bill was then delivered for a valuable consideration to a person on behalf of one *Jeffery*, who negotiated it with the plaintiffs : there was no such person as *Chapman* the supposed payee. In an action brought by the plaintiffs against *Emmett* as the drawer of the bill, the court held upon a special verdict, that the plaintiffs might recover against him as the drawer of a bill payable to bearer, on a count to that effect. Upon the whole therefore I conceive, on this special verdict,

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(a) 3 *Term Rep. B. R.* 174.(b) *Ante*, 313.

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But supposing that it cannot properly be so deemed, then I conceive that the matter of the special verdict will sustain the first count in the declaration, and in this way, viz. the request contained in the bill directed to Gibson and Johnson to pay the money to John White or order, inasmuch as no such person existed, and that was known both to the drawer and drawee, may be considered (as between those parties) as a request to pay so much money, without mentioning any payee; and the indorsement of the fictitious name a mere nullity, conveying no interest to Livesey and Co. as indorsees. It is material then to consider what, under these circumstances, may be the effect of the indorsement from Livesey and Co. on the bill, whereby they direct the contents to be paid to Minet and Feetor. In such case, it seems no forced construction of that indorsement to say, that Livesey and Co. speak by it this language to Gibson and Johnson: "We have on the face of this bill required you to pay 721 l. 5 s. without mentioning any real person to whom it can be paid, (and which you know,) we now direct you to pay that sum to Minet and Feetor." After which direction, the acceptance is made by Gibson and Johnson. Thus the names of Minet and Feetor may be incorporated in the bill, instead of the fictitious name of John White; and they will be intitled to maintain their action on the first count of the declaration, which has stated the special circumstances of the case, and which are verified by the special verdict.

The result of the whole is, that the opinion, which with all deference I have to submit to the house on the questions proposed is,

1. That the making the instrument declared upon, does not appear upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such instrument.

2. That upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer. Or if it cannot, then

3. That the matter of the special verdict will sustain the first count of the declaration.

GOULD, J.—As it appears in the first count and by the verdict, that the drawers Livesey and Co. and the drawees Gibson and Johnson knew that no such person as John White existed,
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and therefore that it was impossible there should be such an indorsement as the bill literally seems to require, and consequently that it could never have been intended there should be such an indorsement, I think that must be rejected as surplusage and repugnant. The bill then will stand as a direction to pay *to order*, and supposing it to have been drawn in that form, to pay to order, I consider the word *our* must have been supplied by a necessary *subintelligitur*; and then the bill being indorsed to the plaintiffs for a full and valuable consideration, they became the *bonâ fide* holders, and upon this construction, clearly intitled to recover against the acceptors. Nor would the law allow them or the drawers to say that they intended to cheat and defraud the holders who should purchase it as a fair bill, which the acceptors ratified as such, and on whom (the bill being directed to them to pay) the plaintiffs could not but have a principal reliance for payment in case they should accept it, which from the nature of the transaction was to be expected. For *Lex est sanctio justa, jubens honesta, prohibens contraria*. I therefore conclude that this bill is to be considered as a bill drawn on the defendants, payable to the *order of the drawers*, and in that view is no more than in the ordinary course of a bill payable to order within the custom of merchants; in which case, whether the acceptor had effects of the drawer or not, is immaterial.

Upon the supposition that the opinion I entertain and have delivered on the first count should be conceived not to be tenable, the next consideration will be, whether the ground taken by the court of King's Bench, to construe it to be a bill under the circumstances of the case payable to *bearer* is right, *ut res magis valeat quam pereat*; whether, when it is impossible for the instrument to operate literally, the equity of the law will not put such a sense upon it as will answer the intention of the parties, and give it effect. It would be enough to say, to give it effect to the innocent party, but I do not hesitate to speak plurally, the *intention of the parties*, since it appears that both drawers and acceptors knew it could not have effect literally in the form in which it was fabricated, and as I have already observed, the law will not endure that they should allege that their intention was fraudulent; for *allegans suam turpitudinem non est audiendus*. It is a rule of law, that every instrument shall be construed in the most forcible manner against the maker. The argument then results to this: it was in the power of the drawers and acceptors (for it is evi-

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dent they acted in concert) to have framed the bill to be payable to a real person or order, or to bearer, and in either case it would have been effectual to charge the drawers, and after acceptance the drawees. But they do not choose to take the first course, and it is highly probable (I might say apparent) that the reason was, they knew that no substantial payee would indorse the bill, and so their purpose in that form would be defeated. They therefore resort to an elusory form, which could not in that shape have any force or effect. It remains then that it should be construed that *they meant* the bill should be *payable to bearer*, as being the only way in which, in its original formation, it could take effect and oblige them as a bill of exchange.

No violence is done; it follows and enforces what must be *presumed to be their intention*, the payment to the person justly intitled to the money. No inconvenience can ensue, because by the satisfaction of the bill all farther circulation of it is at an end. For these reasons I am of opinion that the court of King's Bench had sufficient foundation to decide for the plaintiffs on the fifth count.

Lord Chief Baron EYRE.—This is an action on the case, and the plaintiffs' declaration consists of ten counts. In the first they state, that certain persons using trade and commerce as co-partners, in the co-partnership name and firm of *Livesey, Hargreave* and Co. according to the usage and custom of merchants, made their bill of exchange in writing, (the hand of one the said co-partners on their joint account, and in their co-partnership name and firm, being thereunto subscribed,) and directed it to the defendants by the name, &c. and thereby required them, three months after date, to pay to Mr. *John White* or order, 721 l. 5 s. value received, with or without advice, they the said *Livesey, Hargreave* and Co. then and there well knowing that no such person as *John White* in the said bill of exchange named, existed: upon which bill afterwards an indorsement was made, purporting to be the indorsement of *John White* named in the said bill, and to be subscribed with his hand and name, and purporting to require the sum of money in the bill contained to be paid to the said *Livesey, Hargreave* and Co. or their order. That afterwards the said persons using trade, &c. in the name and firm of *Livesey, Hargreave* and Co. by an indorsement subscribed with the name and hand of *Abraham Goodrich*, by procuration of the said *Livesey, Hargreave* and Co.
 according

according to the usage and custom of merchants, appointed the contents of the bill to be paid to the plaintiffs, and delivered the bill so indorsed with the names of *White* and *Goodrich*, to the plaintiffs; which bill was afterwards, according to the usage and custom of merchants, shewn and presented to the defendants for their acceptance, who according to the usage and custom of merchants, accepted the same, knowing that no such person as *John White* in the bill named, existed, and that the name *John White* indorsed on the bill, was not the hand-writing of any person of that name. *By reason whereof, and by force of the usage and custom of merchants*, the defendants became liable to pay to the plaintiffs the contents of the bill according to the tenor and effect of the bill, and of their acceptance, &c.

The sum of this count is, that *Livesey, Hargreave* and Co. drew a bill on the defendants, payable to a non-existing payee, which was indorsed by somebody, in the name of such payee, to *Livesey, Hargreave* and Co. and by them by procuration indorsed and delivered to the plaintiffs; which bill was afterwards accepted by the defendants, knowing the payee to be non-existing, and the indorsement by the payee not to be the hand-writing of any person of that name.

The second count states the making the bill, as before, by *Livesey, Hargreave* and Co. they knowing that the said *John White* was not a person dealing with, or known to them, and using his name as a nominal person only, and intending not to deliver the same to be actually indorsed by him. This count then states the indorsement as before, and the subsequent indorsement by *Livesey, Hargreave* and Co. by procuration to the plaintiffs, and that *Livesey, Hargreave* and Co. delivered the bill so indorsed to the plaintiffs, without having delivered the same to the said *John White*, and without any actual indorsement or assignment thereof by the said *John White*. It then states the presenting the bill for acceptance as before, and that the defendants well knowing that *Livesey, Hargreave* and Co. had made and delivered the bill as aforesaid, with such intention as aforesaid, and that the name *John White* indorsed was not the proper hand-writing of *John White* in the bill named, accepted the same, &c.

This second count does not seem to differ essentially from the first.

The third count states the bill, as before, to be made payable to them *Livesey, Hargreave* and Co. by the name and description

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1791. of Mr. *John White* or order, and so dropping the indorsement in the name of *John White*, states that the persons using trade, &c. in the firm of *Livesey, Hargreave* and Co. by indorsement under the hand of *Abraham Goodrich* by procuration, &c. appointed the contents of the bill to be paid to the plaintiffs, and delivered it to the plaintiffs so indorsed, and also having the name of *John White* indorsed upon the same. The count then states that it was presented for acceptance and accepted in the common form, by reason whereof, &c.

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In this count nothing is imputed to the acceptors.

The fourth count states the drawing the bill, as before, delivery to *John White*, a regular indorsement by *White* to the plaintiffs, (dropping *Goodrich's* indorsement by procuration,) the presenting for acceptance, and the acceptance. By reason whereof, &c.

This count is in the form in which the declaration ought to be conceived, in real transactions.

The fifth count, upon which the plaintiffs had judgment, states the bill as drawn before, payable to the bearer thereof; that the plaintiffs before any payment made, became and were the bearers and owners thereof; of which premises the defendants had notice; that the bill was presented for acceptance, and accepted, by reason whereof, &c.

The sixth count states the special matter, *ratione cujus* the bill became payable to bearer. It states the bill drawn and payable as in the first count; then the plaintiffs aver that there was no such person as *John White* the supposed payee, but that the name was merely fictitious; by reason whereof the contents of the bill became and were payable to the bearer thereof; according to the effect and meaning of the said bill, and that the plaintiffs afterwards became the bearers and proprietors of it in due form of law. The count then states the presenting the bill and the defendant's acceptance. By reason whereof, &c.

The seventh count is a mere amplification of the third, stating that at the time of making the bill, there was a partnership or house of certain persons using trade, as well in the name and firm of *Livesey, Hargreave* and Co. as the name and firm of *John White*. That the said last mentioned persons made their bill in their co-partnership name and firm of *Livesey, Hargreave* and Co. payable to them the said last mentioned co-partners by the name of Mr. *John White* or order: and that the last mentioned co-partners by an indorsement in writing, appointed the contents of the bill to

to be paid to the plaintiffs, and delivered the bill so indorsed to the plaintiffs. The presenting and acceptance are then stated, by reason whereof, &c. 1791.

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The eighth, ninth, and tenth counts are for money had and received, money paid, laid out and expended, money lent and advanced. The general issue is pleaded, and upon the trial the jury find this special verdict: namely,

“ That the persons trading under the firm of *Livesey, Hargrave* and Co. made a certain instrument in writing, the tenor of which they set forth, of the purport and effect of the bill of exchange as stated in the first count. That at the time of making the said instrument, they well knew that no such person as *John White* therein named, existed. That an indorsement was made by them upon the instrument, purporting to be the indorsement of *John White* named therein, and to be subscribed with his hand and name, and to require the sum in the instrument contained, to be paid to them or their order. The indorsement is then found by them, in the name of *Goodrich*, by procurator to the plaintiffs, and that the instrument so indorsed was delivered by them to the plaintiffs for a full and valuable consideration in money paid to them by the plaintiffs, and that the plaintiffs then and there became and are the holders of the said instrument. That they presented it for acceptance to the defendants, who accepted it, well knowing that no such person as *John White*, in the said instrument named, existed; and that the name of *John White* so indorsed thereon, was not the hand-writing of any person of that name. That the defendants at the time of making and accepting the said instrument, had not, nor had at any time since, any money, goods or effects whatsoever, of *Livesey, Hargrave* and Co. or of the plaintiffs in their hands,” &c. .

Upon this record three questions are made; the last is in substance, Whether this special verdict will sustain any one of the ten counts in the declaration except the fifth? In order to narrow this question, and to introduce what appears to me to be the real point, it may be proper to observe in this place, that five of the ten counts in the declaration, namely, the third, seventh, eighth, ninth, and tenth, seem to be laid out of the case by the special verdict. The bill is not made payable to *Livesey, Hargrave* and Co. by the name of *John White*, which is stated in the third count; nor is it made payable to them by the *medium* stated in the seventh count, that there was a partnership trading in both firms; and the fact found, that the acceptors had no money in

their

1791. their hands either of the drawers or of the plaintiffs, seems to exclude the three last counts. As to those three last counts it is to be observed, in addition to the effect of the *finding in the negative*, that if there had been no such negative finding, still the special verdict would not have supported those counts, the finding amounting at best to nothing more than *evidence of the fact* of money had and received, which according to the rules which govern the application of special verdicts to the matters in issue, is always deemed an insufficient finding. I have said that I object to the three last counts, one of which is for money paid, &c. that they are not found. I go farther, and say, that the evidence which might have supported either of those counts is not found, and particularly the evidence which might have supported the count for money paid, &c. The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and that acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands. But in an action wherein the declaration is upon the bill itself, *creating a duty by the custom of merchants*, this is all out of the case. In any other action of *assumpsit* at common law founded upon a bill of exchange, the bill is offered as evidence only of the duty. It has been expressly determined (a) that a general *indebitatus assumpsit* will not lie upon a bill of exchange; but the *indebitatus* must be for some duty, such as money lent, &c. and the bill is offered as evidence of that duty. Now when it is offered as evidence of the duty, it is but evidence; and any of the presumptions which the writing affords may be contradicted by evidence, and from the whole of the evidence the jury must draw the conclusion of fact, that so much money was lent, so much had and received, &c. The presumptions of evidence which the writing affords, have no application to the *assumpsit* for money paid by the payee or holder of a bill to the use of the acceptor: it must be a very special case which will support such an *assumpsit*. I can conceive a case, in which an acceptance might be evidence of money paid by the payee to the use of the acceptor. I may borrow of one man to lend to another, and if the person of whom I borrow the money pays it by my order into the hands of him to whom I mean to lend it, this might be a ground upon which a jury might find that the money was paid to my use. A bill of exchange may be the *medium* by which I the acceptor borrow the amount of the

(a) 1 Salt. 125. *Lodges v. Steward*.



bill of the payee to lend to the drawer; and when the payee with the privity of me the acceptor, and at my request, pays to the drawer the amount of the bill, the money so paid may be said to be paid to the drawer to the use of me the acceptor. But upon this special verdict, neither the fact, nor the evidence of the fact is found. The payee's money is not found to have been advanced to the drawer at the request of the acceptor, with his privity, or with any sort of communication with him. No man will deny that before the acceptance it was a loan to the drawer, for which the drawer was debtor to the payee. The mere acceptance, without any communication of the circumstances attending that loan, could not alter the nature of the acceptor's engagement, nor amount to a ratification of any thing which had passed between the drawer and the payee, nor charge the acceptor beyond the ordinary effect of his acceptance.

But further, ratification supposes something which may be ratified: but there is nothing found by this special verdict to have passed between the drawer and the payee, in any manner involving the acceptor, or which the acceptor could ratify. We are not first to presume a transaction between the drawer and payee, which could charge the acceptor, and then make his acceptance a ratification of that transaction. There are only two facts stated, which in any manner concern the acceptor. He had no effects in his hands of the drawer's, and he knew that the payee was fictitious. The acceptance, the acceptor having in fact no effects in his hands, approaches nearer to an undertaking for the debt of another which had been previously contracted, than to any other species of contract at the common law. The acceptor's knowledge that the payee was fictitious may infect the contract he has entered into with fraud, but cannot alter the nature of the contract itself. I remain therefore of opinion, that the three last counts, which are general *indebitatus assumpsit* for duties, cannot be supported by this special verdict. And upon the discussion of the question, it appears to me that the argument is more conclusive against the ninth count, for money paid to the use of the acceptor, than against the others.

The fourth count, which is in the common form of declaring by an indorsee of an inland bill of exchange against the acceptor, and supposing the original payee to have indorsed immediately to him, striking out the intermediate indorsements, must also be laid out of the case, because in the first place there is an intermediate indorse-

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indorsement found, and in the next place, it is found that the original payee did not indorse to any body.

The general question upon the matter found in the special verdict, will then be reduced to the question, Whether the matter of the special verdict will support any one of the four remaining counts, (*viz.*) the first, second, fifth, or sixth?

This is a preliminary question, *viz.* "Whether the making of the instrument declared upon, appears upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded upon such instrument?" which will be disposed of by observing, that (although the transaction stated in the special verdict appears to be of a very criminal nature, perhaps sufficient to have warranted a charge of forgery against both the drawers and acceptors of this bill, and also to have warranted the finding of all that is necessary to constitute the crime of forgery, in both) the crime does not appear upon this special verdict so constituted. There is no fraudulent intention found, which is of the essence of the crime; consequently, the question, Whether the policy of the law would suffer an action to be founded upon the crime? does not arise. Upon this question there is no difference of opinion, and therefore I forbear troubling the house with any particular discussion of it; and I return to the question, Whether the special verdict will support any, and which of the four counts before enumerated, *viz.* the first, second, fifth, or sixth, which will include all that remains to be answered of the second and third questions proposed to the judges?

And upon the first view of the case, and comparing the facts stated in the special verdict with the state of the plaintiffs' case in his *first* count, they tally so exactly, that I am obliged to acknowledge that the matter in the special verdict is a direct proof of the fact stated in this count: and one might have expected, that the plaintiff would have had judgment upon that count in his favour, if on any. I agree likewise that the special verdict finds all the material facts, upon which the second and sixth counts proceed. It is a mere conclusion of law from the facts, that in the first and second counts, by *reason of the premises, the acceptor became liable to pay the contents of the bill to the plaintiffs*; and in the sixth count, that by *reason of there being no such person as John White, the contents of the bill became payable to the bearer*. The real question therefore with regard to those three counts, is not, Whether the facts found will sustain them?

them? but, Whether the counts themselves are sufficient in law to maintain the plaintiffs' action? Why was not the judgment taken upon one or other of these three counts? I can imagine but one reason, namely, that the plaintiffs did not dare to risk their judgment upon either of them, supposing that they entered up the judgment at their peril; or if it was the deliberate act of the court, that the court were of opinion that neither of those three counts could be sustained in point of law. I do humbly conceive, that they cannot be sustained in point of law, and that this will be material to the argument upon the second question, which applies to the fifth count, I may say decisive of it. For if it be not a just conclusion of law in the sixth count, that by reason of the bill being made payable to a fictitious payee, the contents of the bill became payable to the bearer, I apprehend it will be extremely difficult to find any other ground in law, upon which the bill mentioned in the fifth count can be deemed in law a bill payable to bearer; and I need not observe that the plaintiffs have nothing but a conclusion of law to rely upon, for maintaining this fifth count; the mere fact found by the special verdict being in direct opposition to the fact stated in the fifth count.

I shall make a few introductory observations, which I apprehend will apply to all these counts. And first I observe, that the questions which arise upon this record are questions which relate to the plaintiffs' declaration, and not to the defendants' plea; to the plaintiffs' title to sue, and not to the defence set up against that title. I presume it must be admitted to me, that a plaintiff who sues upon a bill of exchange must shew a title to sue upon it, in the same manner as every other plaintiff must shew a sufficient title to enable him to maintain the action which he brings. Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular, will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee, or from the drawer, in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee. The title of an original payee is immediate, and apparent on the face of the bill. The derivative title is a title by assignment, a title which the common law does not acknowledge, but which exists only by the custom of merchants. As it is by force of the custom of merchants, that a bill of exchange is assignable at all, of necessity
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the custom must direct how it shall be assigned; and in respect of bills payable *to order*, the custom has directed that the assignment should be made by a writing on the bill called an indorsement, appointing the contents of that bill to be paid to some third person; and in respect of bills drawn payable *to bearer*, that the assignment should be constituted by delivery only. This is simple and obvious; every man who can read, can discover whether the holder of a bill claims to be the assignee of it as indorsee, or as bearer. If it should be questioned whether a bill payable to bearer passes by assignment, or whether every bearer is not an original payee, as being within the description in the bill itself of the original payee, it does not appear to me to be necessary to this argument that this question should be decided. I am content that it should be taken either way. In either case the title of a bearer is self-evident, the title of an indorsee appears by the indorsement itself, the truth of which is guaranteed by the highest penal sanctions. Every thing which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty, and creates a debt or duty by its own proper force, whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom, appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise any thing better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill exchange is tendered, has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple instrument, demands that the simplicity of it should be protected, and that it never should be entangled in the infinitely complicated transactions of particular individuals, into whose hands it may happen to come. Hitherto that policy has prevailed. We shall all agree, that if a man claims to be intitled to a bill of exchange drawn payable to a real payee or order, and has not an indorsement by the payee, he cannot count upon it as upon a bill of exchange, though he should have paid to that payee the full value of it, and though it were bargained, sold,

sold, assigned, and conveyed to him, by every form of conveyance which courts of law and equity in this country have recognized. The policy has lately prevailed so authoritatively, that two juries under the direction of a noble and learned judge, have established, as far as their verdict could establish, a title by indorsement from one of *the name of the payee*, who was *not the real payee* in whose favour the bill was drawn, but into the hands of whom the bill fell by some accident or negligence in the drawer (a). Possibly as names are but designations of persons, and that bill was in fact not made payable to that person, these verdicts may not be acquiesced in, and the question as to that indorsement may be considered as not finally settled. While I am speaking, I hear from authority that the question is *not finally settled*, for that the last verdict, which I had understood to be general, is a special verdict; but the very question is an illustration of the proposition, that a bill of exchange is what it imports to be upon the face of it. The plaintiffs in this cause have taken upon themselves to count, in that part of their declaration which I am now examining, upon a *bill of exchange*, and to state a title to that bill by *assignment*. In their fourth count they state a strict title to it by indorsement from *John White* the nominal payee. The special verdict has found the writing upon which the question arises, to be an instrument in writing purporting to be a bill of exchange, drawn payable to Mr. *John White* or order; but the special verdict has directly negatived the supposed indorsement by *John White*, and I think we all agree that upon the fact the plaintiffs have failed to make out that title. If my introductory observations are well founded, it should seem that the plaintiffs can make no other title to a bill of exchange so constituted. At the common law it was not assignable at all; it is assignable by the custom of merchants only; and the custom of merchants directs that the assignment should be by indorsement from the person to whom it is drawn payable: and I have supposed it to be agreed, that if the payee were a real person, it could by no possibility be transferred in any other manner. But the plaintiffs have stated a title of a different kind in their first and second counts adapted to the truth of the case as it stands established by this special verdict. They agree that this bill was drawn payable to *John White* or order, but they say the name *John White* is a fictitious name, and his indorsement consequently fictitious; that this was known to the acceptors when they accepted, that

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(a) *Vide Meade v. Young*, 4 Term Rep. B. R. 28.

1791. they, the plaintiffs, received the bill from the drawer with his indorsement upon it by procuration ; and by *reason of all this* they insist, that though they have no indorsement from *John White*, yet that according to *the usage and custom of merchants* the acceptors became liable to pay the value of the bill to them. Where the traces are to be found of the usage and custom of merchants applying to such a case, I have not yet discovered. This conclusion is a conclusion of the law merchant, or it is nothing. How is it to be deduced ? Surely no logician would draw such a conclusion from such premises so stated. If it be the arbitrary rule of positive law governing a case so stated, I ask, Where is that rule to be found ? If no such rule is to be found expressly laid down in the law merchant, is it to be collected by inference from any of the known rules of that law ? Is it not a monstrous absurdity, to suppose that the usage and custom of merchants can have any thing to do with a case, which upon the bare state of it, is only fit for the *Old Bailey* to give the rule upon ? What is the proposition of the plaintiffs, reduced to the fewest words possible ? “ We are not the assignees of this bill of exchange by the indorsement of the payee, it is impossible we should be, because in truth there was no payee in existence ; therefore according to the usage and custom of merchants we are intitled.” Whereas the conclusion which the custom makes, must be, “ therefore you are *not* intitled.” The common law must say the same thing. It must say, “ it is only by force of the custom of merchants that this *chose in action* can be claimed by an assignee ; you have not made yourselves assignees according to the custom of merchants, therefore the common law cannot recognise your title.” These plaintiffs, instead of shewing themselves assignees according to the custom, have confessed that they are not such assignees, and in doing this they have furnished another argument against their title, to which I could never find an answer, *viz.* that this supposed bill of exchange was in its original conception, *a mere nullity, a piece of waste paper*, upon which the custom of merchants never attached, in which no man ever had an interest, and in which, consequently, no interest could be transferred under any pretence of indorsement by any body, or by delivery of possession, or in any other manner whatsoever. This argument may require a little more examination and discussion. I will go by steps. If I put in writing these words, “ I promise to pay 500*l.* on demand value received,” without saying

saying to whom, it is waste paper. If I direct another, to pay 500 *l.* at some day after date for value received, and not say to whom, it is waste paper. Will it mend the matter if I say, "I promise to pay 500 *l.*" or if I direct another "to pay 500 *l.* to the pump at Aldgate?" I use that vulgar expression because it has been used, and because it forcibly expresses the idea I wish to convey; *what is a fictitious payee but the pump at Aldgate?* If I add, "or order," what difference does it make? If I add, "or bearer," there is a very sensible difference. There may be a bearer, but in the nature of things there can be no order. The bill therefore cannot be transmitted by order: the fictitious payee can no more order, than the pump at Aldgate can order. Such a bill then is a mere nullity in its original conception, and must ever remain a mere nullity. It is impossible ever to animate it, or give it motion or transmissibility. The drawers of this declaration saw these difficulties in the title of the plaintiffs, claiming to sue on a bill of exchange payable to *John White*, a fictitious payee, or order; and therefore in the fifth and sixth counts they made a bold attempt to manufacture the bill a-new. But they seem not to have made the best use of their materials. If they had declared upon a bill drawn by *Livezey* and Co. (the indorsers by procuration) payable to the plaintiffs or their order, they might have alleged that our books say that every indorsement is a new bill; and if that be so, this bill is a new bill, wherein the indorsers are drawers and the indorsee the payee*. But they have not chosen to take this ground. In the fifth count they say simply, that the bill was drawn payable to *bearer*; in the sixth they say, that the bill was drawn payable to *Mr. John White or order*, but that the payee was fictitious, and therefore the contents of the bill became payable to the bearer, according to the effect and meaning of it. This last statement has the merit, at least, of being very distinct; and though it determines the construction of the bill by a fact *dehors* the bill, (for it cannot appear on the face of the bill itself that the payee is fictitious,) it is a fact existing at the moment when the bill was fabricated; whereas in arguing the special verdict as applied to the fifth count, to shew that this bill, though purporting to be drawn payable to order, was in the eye of the law merchant a bill payable to bearer, it becomes a very complex case. The subsequent indorsement in the name of *John White*, the indorsement by procuration from *Livezey, Hargreave* and Co. and the acceptors' knowledge of the circumstances, are all called in to assist in the demonstration that this

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* [See *Gibson v. Hunter*, post. vol. 2. p. 187. 288. *Parl. Cases*, 8vo, tit. *Premissory Note*.]

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 I am at issue, with respect to the sixth co
 point. They say that a bill drawn to
 bill payable to bearer, according to the eff
 I say that such a bill is a mere nullity.
 is not a very sound argument that it mu
 because it cannot be payable in any other r
 it is not even stated in the sixth count, tha
 being fictitious the bill became payable to
usage and custom of merchants; but the word
 “*and meaning of the bill*” are substituted in
 words. Upon what authority was it said
 and meaning of this bill? It is directly
 of it. If the intention of the drawers,
 plaintiffs themselves will assist us to find
 the purport of the bill is to be supposed n
 conveyed, they all consider this bill as a bi
 but as a bill to pass by indorsement in f
 purport; and there are in fact indorsement
 is the authority for the averment, that in
 effect and meaning of this bill that the
 payable to bearer. Is there any better p
 than it must be so, because it could not be

Thus far I have considered this bill as
 a fictitious person or order, without more
 legations in the sixth count. If we go a
 the particular circumstances stated in the
 general proposition in the sixth count is
 now to enter upon a discussion of those ci
 mining the argument upon the particular c
 of these plaintiffs, as stated in the special
 the application of them to any of the cou
 the fifth count, to which they have bee
 being applied, I confess I have great di
 Transactions are stated which arose subse
 the bill: how they can affect the constru
 at all, what the chain of reasoning is, how
 a bill drawn payable to *John White* or
 bearer rather than a bond, I confess my
 to comprehend. The sixth count suppo
 to have been the *immediate* effect of the
 then this was a bill payable to bearer befo

the plaintiffs, before the acceptance, and before the false indorsement in the name of *John White*, and the real indorsement of the drawers by procuration; then an honest acceptor, who did not know the fact of the payee being fictitious, became bound to pay this bill to any man who brought it, without an indorsement. Is an honest acceptor to be put into that predicament? When he requires an indorsement as the title of the holder to demand payment of him, agreeable to the purport of the bill, is he to be answered with an action and a recovery against him by the bearer, upon proof made at the trial of a fact (of which he knew nothing) that the payee was fictitious, by reason whereof, according to the effect and meaning of the bill, the contents became payable to the bearer? This surely is too strong to be insisted upon. The sixth count must therefore be abandoned, and the knowledge of the acceptor must be taken in aid to eke out this extraordinary proposition. The fact, as it is stated in the special verdict, is, that the acceptors at the time of their acceptance knew that the payee was fictitious. The argument which is built upon this fact, if I understand it, is *argumentum ad hominem*, that he shall never be permitted to defend himself by alleging that the payee was fictitious, and therefore that the plaintiffs have no title. The argument is pushed one step further; it is said, as against him it shall be a bill *payable to bearer*. We have legal principles which govern the *argumentum ad hominem*; as far as they will lead me I am content to follow them; but I dare not go further. I am ready to admit that beyond the strict legal estoppels *by deed* and *in pais*, we have received into the law of *England* a sort of moral estoppel. We say, no man shall be heard to allege his own crime or turpitude in his defence. And in that sense I agree, that no man shall take advantage of his own fraud, and he shall not set up his own fraud by way of defence.

But a plaintiff must always recover upon his own strength. He must state and he must prove a case, which is *prima facie* sufficient. When that is done, a defendant shall not set up his own fraud, by way of answer and defence. As against him, the plaintiffs' case, though defective if the whole truth could come out, shall prevail. That this is the rule of law which governs legal estoppels, will appear by a reference to two cases reported by Lord *Raymond*, *Hermitage v. Jenkins*, 1 Lord *Raym.* 729. *Palmer v. Ekins*, 2 Lord *Raym.* 1550. In the last Lord *Raymond* says, in giving the judgment of the court, "There

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" upon the very fact of the declaration it appeared to the court,
 " that the lease from the defendant was only a lease by estoppel,
 " and nothing of an interest could pass thereby, and consequently
 " nothing could pass by the assignment to the plaintiff; but
 " here, upon the face of this declaration, a good title appears in the
 " plaintiff, and that being so, *the declaration itself is good*, and the
 " defendant by her plea pleads a fact, which by her indenture
 " she is estopped from pleading, which makes the plea ill." As
 to the moral estoppel, I will cite the concluding words of a judg-
 ment (a) pronounced against a plaintiff by a noble and learned
 judge in the name of the whole court of King's Bench: " The
 " defence which is made, is of a most unrighteous and unconscien-
 " tious nature, but unfortunately for the plaintiff, the mode which
 " she has taken to enforce her demand cannot be supported, and con-
 " sequently there must be judgment for the defendant." The
 noble and learned Lord was perfectly correct, when he delivered
 this opinion. Where the plaintiff himself cannot shew a *prima*
facie case, the defendant is not driven to plead any thing; he
 demands the judgment of the court upon the plaintiff's own
 case. A defendant may be estopped to plead, but was it ever
 seen in our law that a defendant was estopped to demur? As to
 some of the counts in this declaration, and among them the sixth,
 we are in effect now arguing a demurrer to the declaration. With
 respect to such of the counts as are to be maintained by the facts
 in the special verdict, and among them the fifth, I agree with
 Mr. Justice *Heath*, that those facts, which in the shape of alle-
 gation or averment upon record would make a count ill upon
 demurrer, must have the same effect in evidence when proved;
 and it is to be observed, that the facts which destroy the plaintiffs'
 title to put this bill in suit, this leading fact in particular, " that
 " the payee was fictitious," are found by a jury, and a jury are
 never estopped to find the truth of a matter in *pais*, even in cases
 where a defendant would be estopped to plead it.

The argument in favour of the plaintiffs, founded upon the
 knowledge of the acceptors, divides itself into two branches.
 1st, The defendants shall not set up the fictitious payee by way
 of defence; (which I agree to be a fair argument, and only dispute
 the application of it.) 2dly, That as against them, the bill shall be
 taken as a bill payable to bearer. This I controvert; I say unless
 it can be proved that it is a bill payable to bearer *against all the*
world, it never can be shewn to be a bill payable to bearer against

(a) 3 Term Rep. B. R. 403.

them. Let the defendants' knowledge evidence every thing it can evidence; infer from it every thing you can infer; you cannot infer from it, nor will it evidence that the bill is a bond. No more can you infer, no more will it evidence that a bill payable to order is a bill payable to bearer. This is absolutely turning one thing into another, instead of making reasonable intendments and inferences from premises which fairly warrant them. It is also to be observed, that we are not now directing juries what inferences of fact they ought to make from the facts in evidence before them, where there will be a certain latitude which an honest indignation, in a case of great fraud, may sometimes enlarge to its utmost verge. But we are applying rules of law to a precise state of facts in a special verdict, where no latitude at all can be admitted. I said that the first branch of this argument was inapplicable. The defect in the plaintiffs' title arises upon their own shewing in the declaration, and in evidence. Having no title, they are obliged to state, in the place of title, that the defendant has been party to a fraud on them, by which they have been robbed of their title. Every court of justice may and ought to say this is a wrong, for which there ought to be redress. But what court can say, that by reason of such premises the plaintiff is not robbed of his title but has a title; or if they are obliged to admit that he is robbed of the title for which he bargained, can say, "true, but we will make another for him?" This is what is here insisted on, and this is what I cannot comprehend. I trust that I have a proper detestation of fraud, but I conceive that it would be much better to punish fraud, when we meet with it, in the direct way either criminally or by the action *ex delicto*, than to refine too much in order to correct it, at the hazard of shaking general rules and disturbing land marks. This is a sort of countermining which I think a very delicate and a very dangerous operation. I have not forgot that an argument has been drawn from a supposed analogy between bills of exchange and deeds, to prove that a court of justice ought to new-mould a bill of exchange, and construe a bill drawn payable to order to be a bill payable to bearer, *ut res magis valeat quam pereat*. I discover no analogy between deeds and bills of exchange. Deeds are at the common law, they have their operation and their construction by the rules of the common law, they are contracts of a more solemn nature than other contracts; between particular parties, respecting particular interests, in particular subjects. Bills of exchange are instruments taking effect by the custom of

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merchants, intended to circulate visible property according to their apparent purport, entirely detached from, and independent of, all particular interests, particular subjects, and the private transactions between the original parties to the instrument. And I think I may fairly argue from the different nature of the instruments, that upon the very same general principles, which have disposed the common law of *England* to mould deeds by construction, so as to effectuate the intent of the parties, *ut res magis valeat quam pereat*, the law merchant must restrict bills of exchange to the precise mode of negotiation determined by the language of the bills themselves, without regard to anything *dehors*. But let it be supposed for the sake of the argument, that there may be some analogy between deeds and bills of exchange; I ask, What are the instances in which construction and interpretation have taken so great a liberty with deeds as to afford an argument by analogy, for construing in this case a bill drawn payable to order, to be a bill drawn payable to bearer? The instances which had occurred to me, as likely to be insisted upon, do in my apprehension afford no argument in support of this position. A deed of feoffment upon consideration without livery, may enure as a covenant to stand seised to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former and the confirmation of the latter. A feoffment without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed, which under circumstances may operate as a covenant to stand seised to uses. Why? The feoffor has by the deed agreed to transfer the seisin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract an use in favour of the intended feoffee. The seisin which remains in the feoffor, because the deed is insufficient to pass it, must remain in him bound by the use. This is the effect of the feoffor's own agreement, plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seised to uses. It is a construction put upon the words of his deed, which *his words will bear*. So a deed, importing a grant of an interest by two, one intitled in possession, the other in reversion, is in consideration of law, the grant of the first, and the confirmation of the second. Why? The deed imports

imports to be the grant of a present estate by both, and it is the apparent intent of both, that the grantee shall have the estate so granted; but the deed of the latter having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of which he may make good to the grantee the estate granted to him by the first grantor. This is to be done by a particular species of conveyance called a confirmation. The words which are used in this deed, in their strict technical sense, are words of confirmation as much as they are words of grant. In the mouth of this party the law says that they are words of confirmation, and shall enure as words of confirmation in order to give effect to his deed, *ut res magis valeat quam pereat*. Here again the construction which the law puts upon the words of the deed, is a construction *which the words will bear*. The words have several technical senses, of which this is one, and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases we find words interpreted, not in their most general and obvious sense, it is true; but if they are interpreted in a manner which the *jus et norma loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances; I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, *that the words may bear the sense* which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds but make deeds for them. Sir *Edward Coke*, in his comment upon one of the sections of *Littleton's* chapter on confirmation, has a passage which is at once an authority for this rule and an illustration of it. "Here it is to be observed, that some words
 " are large and have a general extent, and some have a proper
 " and particular application. The former sort may contain the
 " latter, as *dedi* or *concessi* may amount to a grant, a feoffment,
 " a gift, a lease, a release, a confirmation, a surrender, &c. and
 " it is in the election of the party to use them in pleading, to
 " which of these purposes he will. But a release, confirmation,
 " or surrender, &c. cannot amount to a grant, &c. nor a sur-
 " render to a confirmation, or to a release, &c. because these
 " be

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“ be proper and peculiar manner of conveyance
 “ *to a special end.*” *Co. Litt.* 301. b. or
 “ *are narrow words, and have a particular*
 “ *and particular application only.*” Having
 the House, I begin to think that I should
 benefit, on my part of the argument, on
 deeds and bills of exchange, and of the
 rules of construction which govern those
 For surely a surrender and a grant are not
 than a bill of exchange payable to order
 payable to bearer. And if bills of exchange
 and bills of exchange payable to bearer,
 nature of proper and peculiar manner of
 destined each to a special end, the analog
 should never be deemed to amount to the
 passage, by putting the construction and
 particularly the deed of grant operating
 a rational and intelligible footing, will be
 of the argument, which having the coun-
 rity, deserved great attention on my part
 much perplexed my mind; because after
 in examining it, I could never see distinct
 case. Indeed I think it must generally be
 be a fallacy in an argument built upon
 rules and principles of the common law,
 concerning real property, to the law merchant
 local or limited law. And I am much in
 fallacy of the argument on the part of
 be a fallacy, consists in this, that the
 common law and the law merchant have
 attended to. I can very well understand
 though it refuses its sanction to the ac-
 exchange, merely as such, (as being in the
 law *nudum pactum* only,) may interpose
 drawer, and payee, to regulate engagements
 have entered into for a valuable consideration
 acceptances; may in a very particular case
 in paying a bill, or even oblige him to pay
 person not intitled by the law merchant to
 it in a course not warranted by that law
 bills of exchange may become evidence
 sorts of *indebitatus assumpsit*. But what I

a man will demand payment according to the law merchant, he must bring his case within that law, and in my apprehension, can pray in aid nothing of which the law merchant will not take notice, though it should happen that the common law might take notice of it. Thus in this case, the plaintiffs, supposing them to be innocent indorsees, may perhaps, (I use the word perhaps, because this point is not the point now in judgment,) upon the ground of this bill, have a remedy at the common law for the wrong done to them in passing upon them a bad bill, where they had a right to expect a good one. But it would be the grossest absurdity in the world for them to insist, that because a bill which is bad by the law merchant was passed upon them for a good one, therefore it became a good one by the same law merchant, or that it could be made good by the common law *eo nomine*, as a bill of exchange. Another, a different remedy they may have by the common law, and I have no doubt but that the plaintiffs would have sought their remedy in that mode if bankruptcies and insolvencies had not intervened, which would probably defeat a suit of that nature. This will not be a reason with the House of Lords for straining any point in order to reach this case, inasmuch as it must be at the expence of creditors who have now vested interests in the fund and estates of their debtors, which ought not to be divested or diminished but in the strictest course of law.

I have hitherto purposely avoided touching upon the supposed hardship of the particular case of these plaintiffs, or upon the magnitude of the question in respect of the property which may be affected by it, or as it may affect the interests of commerce. In general, considerations of hardship interest our feelings too much. It may be a hard case, but the law ought not to be strained, much less altered in order to reach this hard case. I have already observed, that it becomes a hard case only from the accident of the insolvency of the parties, admitting it to be a hard case. But where is the hardship? The plaintiffs say, that the acceptors were informed that this bill was drawn to a fictitious payee. Were the plaintiffs themselves informed of it? It is not so found by the special verdict, but I think there is great reason to apprehend that they were informed of it. They take the bill under an indorsement by procuration from the drawer. A bill drawn payable to a real payee, and coming fairly back again into the hands of the drawer, has done its duty, and would be cancelled unless the opportunity of cheating the public of the stamps be admitted

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admitted to be a good reason for throwing circulation. Surely the circulation of such a bill from the drawer, upon discount, is no transaction, but gives the party to whom it is given ground to suspect what the real truth is. I do not suspect, why should he not take the course that there are a great number of other bills of this kind: I am afraid to say to what a dangerous an extent has the false credit of these bills been pushed. This circumstance has had more weight it ought to have; it has produced litigation of the claim.

I confess myself to be a very imperfect judge of the effects of this cause in commerce, and probably I am mistaken in the effects which this cause may produce in the future. But I will venture to state what has passed in the present subject. I take the interests of commerce to be to support *fair*, and to discountenance *false* bills. The interests of gentlemen who trade in money, and the interests of commerce are the same. I apprehend that the commerce of the kingdom has received a deep wound from the failure of a capital house when the persons who have been discounting at that house shall receive not less than twenty per cent. by proving their debts under twenty pounds. That gentlemen of this description should give any check or interruption given to this circulation of bills of exchange, I can conceive. They are better for being fictitious. He who has credit will for very obvious reasons move heaven and earth to raise money to take up that bill when it becomes due, when he can pay no other creditor. That the merit of the complaint, is to me incomprehensible. I do not forget the original and true use of bills of exchange, which are bottomed in real mercantile transactions: the signs of valuable property and equivalent to the capital stock of wealth in circulation, and increasing the trade and commerce of the country are the bills of exchange which the usage of merchants originally introduced into the world to be intended to protect. Let the merchant pay his bills of exchange with that false coinage of base pa-

been of late forced into circulation ; the use of which is to encourage a spirit of rash adventure, a spirit of monopoly, a spirit of gaming in commerce, luxury, extravagance, and fraud of every kind, to the ruin and destruction of those whose credulity can be practised upon by a false appearance of regular trade, carried on upon a solid bottom ; and then let him say, whether he dreads the reversal of this judgment.

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I confess I thought that a fortunate occasion did now present itself, for interposing a most salutary check to a growing evil ; an evil already swollen to a most enormous bulk, the weight of which must necessarily cramp and depress every man who trades upon his own capital, and which threatens to overwhelm the fair trader. Let us not deceive ourselves. There is but one remedy for the evil. If such bills may be recovered upon, if they may be proved under commissions of bankrupt, there are persons enough interested to give them circulation, let the hindmost fare as he may. To check them, and oblige men to deal fairly, as far as real names go to constitute fairness, the recovery must be stopped. If the real parties can keep back their own names by using fictitious names, they can cover this false credit in impenetrable darkness. This Lord *Mansfield* saw very distinctly in the case of *Stone v. Freeland*. But that which I do not understand in that case, is, how it happened that for the first time in his life, he expressed no disapprobation of an apparent fraud, but assisted to give it effect. Touching the effect and application of that case to the present, I refer to Mr. Justice *Heath's* observations upon it. I have only to add, that knowing that I had the misfortune to differ from many of my learned brothers, in the opinion I have entertained of this case, I had too much reason to apprehend that I had totally misunderstood it, and have very reluctantly committed myself in this unequal contest. But Mr. Justice *Heath's* argument will be an apology for my giving this house so much trouble. The answer to the second and third questions, which it is my duty to submit to your Lordships, thinking as I do of the case, is, that upon the matter found in the special verdict, the bill mentioned in the fifth count *cannot* be deemed in law a bill payable to bearer ; and that the matter of the special verdict will *not* sustain any other count in the declaration.

HEATH, J.—I shall take the liberty to decline answering the first question proposed to us, because as I am of opinion that the plaintiff is not intitled to recover on any count in this declaration,

the

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* [Was not
the circum-
stance of the
payee being
fictitious, a
latent ambi-
guity? See
post, p. 622.]

the first question cannot arise in my mode
second question is, Whether this may be
payable to bearer? Every instrument mu
from the powers of the grantor and the l
ment, and no extrinsic evidence can be
explain a latent ambiguity, which is not t
purports on the face of it, to be a bill c
order. The drawer had power to give it
ants have so accepted it, and no evidence
it a different operation. It has been in
and indeed it was the ground of the decisio
Bench, that if the contract of the party c
the rules of law, operate in the way inten
according to his power at the time of ma
been attempted to be supported by a passag
45. a. concerning a lease granted by tena
der man, where it was held that the deed
the life-time of tenant for life, as his *lease*
him in remainder, and after the decease o
lease of the remainder man: and it has be
ference between a bill of exchange payabl
to order, is not greater than between a
To this I answer, that I freely admit, if
cannot operate in such manner as was int
shall operate as by law it may; but then a
for that purpose. As to the instance cited,
technical words necessary to make a deec
ation: it is sufficient if the party confirm
which another had granted. *Co. Lit.* 301.
the distinction concerning the operation
“ words are large, and have a general ex
“ which may amount to a feoffment, a g
“ lease, confirmation, &c. But a rel
“ surrender, cannot amount to a grant,
“ confirmation, or release, because these
“ manner of conveyances, and are destin
From this passage, as well as from comm
lowing conclusions are to be drawn:

1st, That the operation of a conveyan
simply from the power of the grantor, b
power and the legal operation of the instr
mode of conveyance could operate in all

every purpose, it would be nugatory and useless to have several modes of conveyancing, and conveyancing itself no longer governed by any principle, would cease to be a science. To make the analogy perfect between a deed and a bill of exchange, in respect to the rule of construction that must govern them, it must be shewn that the present bill contains such apt and operative words, that it may be construed either as made payable to order, or bearer; so that if it cannot operate as a bill payable to order, it must be taken as a bill payable to bearer. But the contrary manifestly appears on the face of the two instruments: and if this construction were to prevail, it would raise a contract beside the intention of the parties; for the drawer of a bill payable to bearer, in adopting that form, exonerates the drawee from certain inconveniences attending bills payable to a certain person or order, such as a danger of the hand of the first payee being forged. The drawer of a bill payable to order consults the convenience and security of the first payee, and the subsequent purchaser of the bill, without whose authority the drawee is not safe in paying the bill, so that if the bill be stolen or casually lost, the true owners of the bill may be safe. As these instruments are so different in their operation and destined purposes, they are not convertible; and it may as well be contended, that a release will operate as a grant, as that a bill payable to order can be declared on as a bill payable to bearer. To consider this in another point of view. A bill to bearer is more comprehensive than a bill to order, inasmuch as it comprizes all the special appointees to whom a bill of the latter sort may be directed. It was however decided in the case of *Hodges v. Steward*, 1 Salk. 125. at a time when a bill payable to bearer was not deemed to be within the custom of merchants, that a bill payable to a certain person or bearer, could not, by an indorsement of the first payee, be converted into a bill payable to order, so as to charge the drawer. The obvious reason is, that it was the intention of the drawer to frame a bill payable to bearer, and he could not be charged beyond his original undertaking. It seems to be a just and necessary inference, if the more comprehensive bill which is payable to bearer, cannot be changed into the less comprehensive which is payable to order, that the reverse cannot take place. It is repugnant to every principle of law, that specialties, or instruments in the nature of specialties, should receive a construction from extrinsic circumstances, which their import does not warrant;

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and

1791. and if they were to be construed not according to their legal operation, but according to the power of the person from whom they move, as is now contended, this novel principle would have the wonderful effect of curing all defects in deeds and instruments, provided that the maker of them had but sufficient power for the purpose.

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FRETOR
in Error.

In order to prove that a bill may receive a construction different from its tenor, a bill has been supposed payable to the *pomp* at *Aldgate* or order, and it has been demanded whether this would not be a bill payable to bearer? I answer in the *negative* without hesitation. It is a bill payable to an inanimate thing, under whom no title can be derived. It is not the province of the law to assist folly; recourse must be had to the drawers. There is another essential difference between different conveyances concerning the same subject, and bills payable to order and bills payable to bearer, which is, that in respect to conveyances, the *contract is the same*, and the only question is, In what legal form it shall take effect? In respect to bills, the contract is different, and one species of contract cannot be substituted in the place of another. Arguments drawn from the inconvenience of the decision are strong and forcible. It is the object of the drawers of bills, that the bills should pass in circulation, and the interest of commerce requires it. The law of *England*, which generally discountenances the assignments of debts and choses in action, has in this instance submitted to the custom of merchants. It is the essence of a custom, that it be certain and reasonable. If it be defective in either of these particulars, it must yield to the common law, concerning which there can be little doubt. To construe this bill

* [See ante,
page 620.]

to be payable to bearer, on account of *the latent circumstance* * of a fictitious payee, unknown to the purchaser at the time, is to introduce infinite confusion and perplexity. Suppose the purchaser of a bill not finding the payee of a bill, declares on it as being payable to bearer, the acceptor might defeat the action by setting up some obscure person bearing the name of the payee. If the attesting witnesses to a bond could not be found, or if there were none, so that the delivery could not be proved, and therefore a recovery could not be had on it as such, it cannot be contended that in an action of *assumpsit* the bond might be given in evidence as a note of hand. The reason is evident; the creditor has taken his security in a certain determined form, he cannot at his pleasure alter it against the stipulation of the debtor, and yet the obligation includes a promise to pay the money.

In

In this case the jury have found that there was a fictitious payee; but can the holder of the bill be always prepared with that evidence? If it be doubtful on the face of the instrument, what is the legal operation and effect of it, where is the certainty? If it be founded in fraud, where is the reasonableness?

The counsel for the defendants in error have given up all the other special counts except the third, wherein it is stated that *Livesey, Hargreave, and Co.* directed the bill to be paid to them by the name of *John White*. I answer that the custom of merchants as little applies to this count as to the other special counts, for no custom can warrant the drawing of a bill payable to one man by the name of another. But it has been urged at the bar, that the acceptors shall not be received to annul their own acceptances, and that it does not lie in their mouths to insist on the proof of the hand-writing of the first payee, when they knew at the time of their acceptance that he was merely fictitious, and no such person as *John White* really existed. And in support of this argument, they cited the case of *Stone v. Freeland*, which was determined at *Guildhall* sittings after *Easter* term 1769. The circumstances of that case were the same as the present, and *Lord Mansfield*, after observing that the bill was drawn to enable the drawer to raise money, told the jury that the defendant had enabled the drawer to do this by lending his acceptance, and when he had by so doing put the bill in circulation, it should not lie in his mouth to make the objection that he had nothing to do with it. On this decision I first observe, that the noble and learned Lord did not mean to controvert the general rule, that it is necessary in order to recover against the acceptor to prove the hand-writing of the first payee, but only in the particular circumstances of the case dispensed with the proof. In the same manner, if the obligor of a bond should fraudulently remove a witness, and it should so appear at the trial, the bond is established by the acknowledgment of the party, without farther proof of the hand-writing. Suppose in the case of *Stone v. Freeland* the jury had found a special verdict, they must have found the indorsement of the first payee, considering the defendant as being estopped from requiring the proof of it; but here the contrary is found. In order to examine how far the authority of this case is applicable, it ought to be considered, whether the circumstance of its being known to the acceptors that the payee was fictitious, will enable the plaintiffs who were indorsees to recover on any of the counts

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FRACTOR
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in this declaration. It will not support where it is so expressly stated, because such on fraud, and not on the custom of merch are radically bad, and will not warrant a the plaintiff. If this allegation will vitiate it is stated, it must necessarily follow that have the like effect in respect to the other no such allegation is inserted. The four special one that may be supported in point may be applied. That count states the person, and his indorsement to be a real finding of the jury directly contradicts it, fiction. It seems to me, that the plaintiff availed themselves of the authority of the *land*, if it be law, at the trial; they shou the indorsement of the first payee ought to proved; but having missed that opportunity late. The cases of *Tatlock v. Harris*, d Bench, and *Collis v. Emmett* decided in th against my opinion. I was prevented by fi my duty in court when the last case was d present, I could not have concurred in th standing the great deference I have for the abilities of the other judges. But this c your Lordships in order to review those de ships have a right to call on me for my subject, and it is my duty to give it. It is that the circulation of these bills is extre ought to be restrained. It is the great co days, which has grown to a gigantic he needy adventurers to engage in desperate on the money which they raise on this the present question, a million of proper wonder that this traffic has spread pove ruptcy, through large districts which it enable the holders of such bills to recover without proving the hand-writing of the a credit on the bills themselves. The acc are tempted by a large commission to let obvious reason of inserting the name of that too many bills should not appear in ci

name at the same time. Make it necessary for the purchaser of the bill to look to the first payee, and it will be impossible to defraud mankind in the manner, and to the extent that has been practised. In order to administer an effectual remedy to this evil, it is not necessary to stretch the common law beyond the known and temperate decisions of former times. It is not necessary to introduce subtle inventions and new modes of reasoning, unknown to the plain sense and understanding of our ancestors. Let the ancient law be adhered to, and the evil must in a great degree cease. Nor is the plaintiff without remedy; for he may sue the drawer, and probably by another, differently framed from any of the present counts, or by an action differently conceived, he may recover against the acceptors; but on that I give no opinion.

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v.
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in Error.

After the judges had thus delivered their opinions, the house adjourned. On *Monday, February 14*, a debate took place in which Lords *Kenyon, Loughborough*, and *Bathurst* spoke in favour of the judgment, and the Lord Chancellor* against it. The several grounds of argument taken by their Lordships respectively, were nearly the same as those above stated in the opinions of the judges.

* [Thur-
low.]

The debate being concluded, the Lord Chancellor put the question, Whether the judgment of the court of King's Bench should be reversed? which passed in the negative without a division.

Judgment affirmed.

THE END OF HILARY TERM.

C A S E S

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ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Thirty-first Year of the Reign of GEORGE III.

BARWICK v. READE.

Monday,
May 16th.

The full pay
of a military
officer can-
not be as-
signed.

THE defendant, who was a lieutenant of marines, assigned his full pay to the plaintiff, in trust, first of all to pay and satisfy himself (the plaintiff) an annuity of 20*l. per annum*, and then to pay over the surplus to the defendant, and also gave a bond and warrant of attorney as a further security. In the last term a rule was granted to shew cause why the deed of assignment, bond, and warrant should not be given up to be cancelled on several grounds (*a*), the most material of which was, that the full pay of a military officer could not be legally assigned. When the motion was made, the court intimated a very clear opinion that such an assignment was illegal, it being contrary to the policy of the law that a stipend given to one man for future services, should be transferred to another who could not perform them. However the rule was enlarged till this term, when on the motion of *Kerby*, Serjt. it was made absolute, no cause being shewn, but the court seeming to retain their former opinion (*b*).

(*a*) The other grounds were, that the assignee was a trustee for one *Kendrick*, which was not stated in the memorial, and that the names of the witnesses to the deed were not mentioned according to the directions of the stat. 17 *Geo.* 3. c. 26.

(*b*) When the rule was granted, Lord *Loughborough* said, he recollected a similar decision in the court of Chancery, in the case of *Rofs* the army agent; and Mr. Justice *Could* referred to *Dyer*; & *b.* as confirming the general principle which the court laid down.

The

The case in *Dyer* was, "Replevin brought by John Oliver against T. Enforme, who set forth that a stranger was seised in fee of a manor, of which the *locus in quo* was part, and by deed granted to him an annual rent of 20 s. for the term of his life, *pro bono consilio suo impendendo*, with a clause of distress within the manor, and avowed the taking for one year's rent in arrear. To which the plaintiff pleaded in bar, that Enforme was attainted of treason before certain justices, who committed him to the Tower, by force of which he remained in prison for a year next ensuing, within which time the grantor, *pro diversis negotiis suis, consilio ejusdem T. indigebat, et ad eum accedere voluisset pro consilio suo habendo, quorum iudicii et imprisonmenti pretextu, idem O (the grantor) ad eundem T. accedere pro consilio suo in ea parte habendam et requirendam impeditus fuit, et sic consilium prefati T. in causa predicta, in defectu ipsius T. habere non potuit.* To which the avowant demurred in law. And by the opinion of the whole court he had a return, for by the attainder the rent was not forfeited to the king, because it was incident to the cause for which it was given, (namely the trust and confidence which the grantor had in him for his advice,) which he could not grant to another person, and which for the same reason he could not forfeit. As, if a man be created a duke, and for the maintenance of his dignity the king grants an annuity of 20 l. to him, he cannot grant this to another, for it is incident to his dignity. And notwithstanding the attainder and imprisonment, he might have given advice if he (the grantor) had gone to him; and in the plea no default was alleged in him," &c. See also the authorities cited in the margin of *Dyer*. In *Stuart v. Tucker*, 2 Black. 1137. "A lieutenant of marines assigned his half pay to B. in trust for C. and constituted B. his attorney to receive it; and it was holden that A. could not maintain an action for money had and received to his use against C. after his discharge on an insolvent act; because in equity the half pay of an officer might be assigned, and this was an equitable action for money received to the plaintiff's use, but he had already transferred the use of it." A distinction is there taken between whole and half pay, the former being given *pro servitio impendendo*, the latter *pro servitio impenso*. But in *Flarty v. Odum*, 3 Term Rep. B. R. 681. the court held that the half pay of a lieutenant in a reduced regiment was not the subject of a sale, and therefore that his creditors could not compel him to include it in his schedule, under the lords' act. In that case Lord Kenyon was clearly of opinion that the half pay could not legally be assigned; and Mr. J. Buller distinguishes between payments actually due and future accruing payments. And this case of *Flarty v. Odum* was recognized and confirmed by the court of B. R. in this present Easter term. 4 Term Rep. B. R. 248. *Lidderdale v. The Duke of Montrose*. I have also been informed, that a similar decision took place about four years ago in the court of Exchequer, in a case of *Prentice v. Mackie*.

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BARWICK
v.
READ.

MORGAN v. JOHNSON.

Monday,
May 16th.

IN this case notice of declaration was served on the defendant on Sunday Feb. 6th, which he accepted, knowing at the same time it was irregular, as appeared by the affidavit of the attorney who served him with it. A rule having been granted to shew cause why the declaration and all subsequent proceedings (a) should not be set aside on account of the irregularity, Cockell, Serjt. shewed cause, arguing that the stat. 29 Car. 2. c. 7. s. 6. directed, "that no person upon the Lord's Day should serve or execute any writ, process, warrant, order, judgment or decree,"

Service of notice of declaration on a Sunday, is bad, though the defendant accept it, knowing it to be irregular.

(a) Judgment was signed for want of a plea in the vacation after Hilary term.

1791. *Gr.* but that service of *notice* was not with the act. In *Walgrave v. Taylor*, 1 *Ld. Holt*, Ch. J. was inclined to think, that restrain all sorts of legal proceedings, yet that the delivery of a declaration was but process, and therefore good on a *Sunday*.
462. the court held that the delivery of a declaration on a *Sunday* was good. (a) But,

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v.
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The court were clearly of opinion that being on a *Sunday* was bad within the defendant could not by his acceptance waive. Therefore the

Ru
on payment of half the costs, in pursuance entered into by the parties, which was stated

(a) But see *Walker v. Towne and Lee*, Barnes, 309. as margin of 1 *Ld. Raym.* 705. last edit. 8vo, which shew present instance, decided according to the known practice.

Monday,
May 16th.

A sheriff who is ruled, on the last day of a term, to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body.

MEEKINS v. SMITH

IN Hilary term last, the then sheriff of of *cepi corpus*, and was ruled the last day to bring in the body. In the following out of office and a new sheriff was appointed, bail being put in but not justified, *Clayton* attachment against the late sheriff for not bringing in the body. The court doubted whether the late sheriff was liable to an attachment, as it was not in his power to bring in the body, as usual, made over all the prisoners to the new sheriff. To this *Clayton* answered, that a writ of habeas corpus had been made, if that were a sufficient cause was granted, which was absolute, no cause being shewn (a).

(a) The date of the rule to bring in the body was Saturday, the then sheriff's going out of office; it could not therefore be made as such rules usually are. But it was served on the undersheriff. That the late sheriff is liable to the attachment was shewn. *Wyllie's case*, Cro. Eliz. 365. S. C. 1 *Bullst.* 70. *Eg. Price & Another v. Street*, and *Leigh v. Turner*, Mich. 21 C. B. 185. 3d edit. See also *Stat. 20 Geo. 2. c. 37. s. 2. d. 1.* [See also *Reg. Gen. K. B. T. 31 G. 3. 4 Term R.*

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SUMNER v. BRADY and Others.

Saturday,
May 21st.
Notice sub-
scribed to
process, to
appear on the
4to die post.
is good.

THE defendant was served with a *capias quare clausum fregit* returnable in *fifteen days of Easter*; (i. e. the *eighth* of May;) but the notice to appear was “*at the return thereof, being the eleventh day of May 1791*” (i. e. the *4to die post*). A rule was granted on the motion of *Bond*, Serjt. to shew cause, why the proceedings should not be set aside, on the ground that the notice to appear ought to have been on the return day of the writ, viz. *May 8th*, which he urged was the constant and undoubted practice. *Barnes*, 293. (a) *Alfop v. Nicholls*; and to shew that the notice ought to be to appear on the real return day, even though that day should be a *Sunday*, he mentioned *Barnes*, 294. *Green v. Watkins*, *Cook's Cas. Pract.* 97. *Jenner v. Williamson*, *ib.* 98. *Green v. Watkins*, and *Rules and Orders C. B. Hil. 7 Geo. 2*. There was also another ground he said, for setting aside the proceedings, which was, that it appeared by affidavit that the action was brought on a bond payable by instalments, but that the only instalment which had become due was paid into court.

Marshall, Serjt. shewed cause, arguing that the notice was good, it being to appear “*at the return of the writ*,” the words therefore “*being the 11th day of May*” might be rejected as surplusage. But supposing those words not to be surplusage, still the notice was good, as it was to appear at the *true time* when the defendant ought to appear, namely the *4to die post*, the *essoign* day not being in reality the time of appearing. If it should be objected, that by allowing the *4to die post* to be the day of appearance, the defendant would have twelve instead of eight days to appear in; (b) the answer is, that it does not lie in the defendant's mouth to make this objection, to whom it would be a benefit. But in truth the notice is good either way, whether on the *essoign* day or the *quarto die post*.

The court said, they were clearly of opinion that the notice to appear on the *quarto die post* was good, that being the day when in point of fact the defendant was to appear. They also directed a search to be made in the treasury, to see if there were any such rule as that above cited from the “*Rules and Orders of C. B. Hil. 7 Geo. 2*.” when the prothonotary reported that

(a) Last 8vo edition.

(b) This objection was made and holden, on consideration, to be a good one, in *Alfop v. Bagot*, *Prac. Reg. C. B.* 346.

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 WITTER-
 SUEIM
 v.
 Lady CAR-
 LISLE.

to be protested for *non-payment* thereof; and farther, that the said bill of exchange bearing date on the 4th of *January* 1785, was, on the 6th of *February* 1786, presented to *Francis Gregg*, on whom it was drawn, for *payment*; and the said *Francis Gregg* was then and there requested by the plaintiff to *pay* the said sum of money therein mentioned, which he then and there refused to do; and the same was not, nor was any part thereof, then and there, or at any time, *paid*; and thereupon, the plaintiff caused the said bill of exchange to be protested for *non-payment* thereof. And further that the said *Isabella*, the defendant, at the several times of the making of the said bills of exchange respectively, and of the lending the several sums of money therein respectively mentioned, was, and long before had been, and still is *married to, and under coverture of one Sir William Musgrave, Bart. her present husband*; and that the said *Isabella* at those several and respective times, and long before, and from thence hitherto *lived, and does now live separate and apart from her said husband*; and that during all the time she has so lived separate and apart from her said husband, the said *Isabella* *has always had, and been allowed, and paid from her said husband a sufficient separate maintenance to herself*; and that at the respective times when the said bills of exchange were made by the said *Isabella*, the persons upon whom the same were respectively drawn, had not, nor had they at any time afterwards, until, or at the times when the said bills of exchange respectively became due and payable, and were presented as aforesaid, any effects of the said *Isabella* in their hands, wherewith to answer and pay the said bills of exchange, or either of them; and that the said *Seligman* (the plaintiff) sued out his original writ in this suit against the said *Isabella*, on the 26th day of *September*, in the year of our Lord 1789; but whether upon the whole matter in form aforesaid found, the said *Isabella* undertook and promised in manner and form as in the 2d, 3d, and 4th counts of the said declaration is mentioned, or any of them; and whether, at any time within six years next before the suing out the original writ of the said *Seligman*, the cause of action in the said 2d, 3d, and 4th counts mentioned, or any of them, *first accrued or not to the said Seligman*, the jurors aforesaid are wholly ignorant, &c. &c. This was argued by *Bond*, Serjt. for the plaintiff, and *Le Blanc*, Serjt. for the defendant. On the part of the plaintiff, *Bond* said, he presumed, the first point of the argument would be admitted, viz. that the defendant living apart from her husband, and
 having

having a separate maintenance, was liable to be sued as a *feme sole*; to which *Le Blanc* assented; saying, that as that point had been fully considered by the court in the late case of *Compton v. Col- linson (a)*, he should not now dispute it. *Bond* then observed, that as there was a variance between the special verdict and the declaration, with respect to the 2d and 3d counts, (the declaration stating that the bills were presented for *acceptance*, and protested for *non-acceptance*, but the jury finding that they were only pre- sented for *payment*, and protested for *non-payment*;) the plaintiff certainly could not recover on either of these counts, but must resort to the count for money lent. The question therefore was, Whether the statute of limitations would prevent him from re- covering on that count? or in other words, Whether the cause of action accrued on the 31st of *July 1783*, when the bill for 12,000 livres was drawn, and the money lent; or, on the 30th of *Sep- tember*, when the bill was payable? Now the money being actually lent to the defendant as the consideration of the bill, on payment being refused by the drawee, the plaintiff had his choice of three remedies: he might either have brought an action of debt, an action on the case for money lent, or an action on the bill itself, which he has in fact chosen. But if he had relied on the bill itself, the statute of limitations would not have operated till after it became payable, for according to Lord *Holt*, a bill of exchange "must be sued for within six years after " it becomes payable." 3 *Bac. Abr.* 602. Neither then did the statute operate on the count for money lent, which it was agreed should be paid at the end of *September*, before that time; the pro- hibitions of it being equal, and not affecting one sort of action on the case more than another. As therefore, an action on the bill itself would be within the time limited, the writ being sued out on the 29th of *September 1789*, an action for money lent is also within the time: the right of action was suspended till the bill became payable. In *Dagglish v. Wetherby*, 2 *Black.* 747. it is holden, that no action will lie against the drawer of a bill of exchange, till some default has been made by the drawee. And, though in *Bright v. Purrier*, 3 *Burr.* 1687. *B. N. P.* 269. where a bill drawn payable 120 days after sight was refused acceptance, an action laid against the drawer before the time was expired, yet there acceptance was refused, and the party was conscious that he had a right of action before the expiration of

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(a) *Ante*, 334. But there the court gave no positive opinion on that point. [And see *Marshall v. Rutton*, 8 *Term Rep. B. R.* 545.]

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the 120 days. But here the plaintiff could not be conscious of any right to sue before the time when the bill was payable: he lent his money with a stipulation to be repaid at the end of *September* by means of the bill: and he thought he had a valid pledge in his hands. In 3 *Burr.* 1281. Lord *Mansfield* says, speaking of the statute of limitations, "no one can doubt but that the bar "only takes place from the time when the *right accrued*, and not "from the time of *making the promise*." In like manner a fine and five years non-claim will not bar an annuity granted to a third person. *Goodright on dem. Hare v. Board. Cruise on Fines*, 249.; nor the interests of mortgagor and mortgagee, *ibid.* 310. Wherever also there is a fraud, the statute of limitations is no plea, unless the fraud be discovered within the time 3 *P. Wms.* 143. nor even if the fraud be discovered within six years, unless the defendant were conscious of it. *Dougl.* 655. *Bree v. Holbeach* (a). But there was a fraud in the present case in the defendant drawing bills without having effects in the hands of the drawee.

Le Blanc, Serjt. *contra*. The question is, Whether the right of action accrued to the plaintiff within six years, since the statute of limitations begins to operate from the time that such right accrues. But it is clear that the plaintiff had a right of action as soon as the bill was refused acceptance, without waiting for the time of payment, *Milford v. Mayor, Dougl.* 55. *Bull. N. P.* 269. The defendant is not to be deprived of his plea because the plaintiff chose to defer bringing his action till *September 1789*. It might with equal justice be said, that the statute should be no bar at any indefinite distance of time. The plaintiff might also have brought an action on the implied *assumpsit*, at any time after the money was lent. But

The court held, that though on a mere loan of money the time of limitation might commence from the date of the loan, yet where the money was lent on a special contract for repayment, it was the time of the repayment that ought to fix the period of the limitation. Here a sum of 12,000 livres was advanced on the 31st of *July*, to be repaid in *England* on the last day of *September*; and the contract was, not to repay the identical sum, but the value of it according to the course of exchange. Now until that contract was broken, there was no cause of action. As the suit therefore was commenced on the 26th of *September*, it saved the limitation; especially as no laches was

(a) See edit.

to be imputed to the plaintiff, it not being found, that he knew that the drawee of the bill had no effects of the drawer in his hands.

1791.

WITTER-
SHEIM
v.
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LISLE.

Judgment for the plaintiff.

MEEKINS v. SMITH.

Tuesday,
May 31st.

IN this case, one *Davis* was arrested by an officer of the sheriff of *Middlesex* as he was returning from *Westminster-Hall*, where he had been to justify himself as bail for the defendant, but was rejected. Upon this, a rule was granted to shew cause why he should not be discharged out of custody, on the ground that he was entitled to privilege from arrest, both in going to and returning from the court, his attendance being in the course of the cause, and the administration of justice. *Adair and Clayton Serjts.* shewed cause, contending that as bail were not compelled to attend by process, (as witnesses were,) but came voluntarily into court, they had no claim to such a privilege. It was holden in the case of *The King v. Fielding, Comb. 29.* that a person coming to court to swear the peace was liable to be arrested, and in an anonymous case, *Salk. 544.* a person who came to confess an indictment, had no privilege *cundo et redeundo*, because there was no process against him. Although it is stated in *Impey's Pract. C. B. 125.* that bail are privileged, the case there cited from *Barnes* was this; "The defendant being arrested in re- turning from attendance on the court to justify his bail, was "ordered to be discharged." *Jobannet v. Lloyd, Barnes, 27.* Besides, it was highly improper that any man should become a security for the debts of another, while his own were unpaid.

All persons who have relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process so to do, (such as bail,) are privileged from arrest, *cundo et redeundo*, provided their attendance be not for any unfair purpose, such as in the case of bail, an insolvent person attempting to justify.

The court seemed much inclined to think, that not only witnesses, but all persons who were coming to or returning from it, either directly on the business of the court, or in any manner relative to that business, were intitled to a freedom from arrest, and that to arrest them was a contempt of the court. Several cases were also mentioned of barristers, who were arrested on the circuit, being discharged by the judge.

GOULD, J. recollected the instance of a *Mr. Hippisley*, a barrister, who was discharged from an arrest on the circuit by *Mr. Justice Birch* at *Salisbury*. And

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v.
SMITH.

HEATH, J. mentioned a similar th
the late Mr. Baron *Burland*.

At length it was agreed that the r
this day, when *Davis* was brought v
issued in the mean time, and offered
but was again rejected, it appearing th
bankrupt, and in desperate circumstan
ordered him to be remanded, and at th
general rule, viz. that all persons v
which called for their attendance, wh
to attend by process or not, (in which r
were intitled to privilege from arrest a
they came *bonâ fide*. But here there v
the part of *Davis* to impose upon the
he was not to be permitted to avail his

GOULD, J. referred to the year boo
said by *Choke*, that a mainpernor shall
court.

Wednesday,
June 1st.

The court
will not re-
ceive the
affidavit of
an attorney's
clerk, to put
off a trial,
unless it be
stated that
the clerk was
particularly
acquainted
with the cir-
cumstances
of the cause,
and had the
management
of it.

SULLIVAN v. M.

KERBY, Serjt. shewed cause again
the trial of this cause on account
terial witness, by objecting to the affid
by the clerk to the defendant's attorn
himself or the defendant; 2. that it di
was acquainted particularly with the
that the business had gone through h
ceeding to make further observations c
court interrupted him, saying the objec
it would be dangerous to permit atto
swear in their stead. *Clayton*, Serjt
insisted, that no one could have made
propriety as the clerk, because the w
cause was entrusted to him. To this
the clerk might certainly have made
stated that he had in fact the managem

particularly acquainted with all the circumstances of it ; but as it was, the rule must be discharged. 1791.

Rule discharged. SULLIVAN

v.
MAGILL,

Lord LOUGHBOROUGH then directed the secondaries to inform the court in future, whenever an affidavit should be made by the clerk of an attorney, to ground a motion upon to put off a trial.

HALL v. WALKER.

Thursday,
June 3d.

ON the 11th of *May* notice of bail was given, on the 17th an exception was entered, and a rule obtained, on that day, to bring in the body, which was served on the undersheriff of *Middlesex* on the same day. On the 19th, notice of justification was given for the 21st ; on the 21st the bail were rejected, on which day the rule to bring in the body (being a four day rule) expired. Before the rising of the court on the 21st, the defendant's attorney applied to the court for leave to put in other bail immediately, for the purpose of rendering the defendant, who was then in court. Leave was accordingly given, and in a few minutes other bail were produced, who rendered the defendant, and he was, at the rising of the court, committed to the Fleet.

Though a rule to bring in the body has been served, bail may render the defendant without justifying.

On the 23d an attachment issued against the sheriff, for not bringing in the body. To set aside which, a rule having been obtained, *Runnington*, Serjt. shewed cause, contending that it was the known practice of the court, that where a rule to bring in the body had been served, bail must not only be put in but justified, in order to render the principal : but where there was an exception only, and no rule to bring in the body served, there the principal might be rendered without justification : 2 *Black.* 1206. *Poole v. Peate*, *Impey Praet. C. B.* 2d edit. 156. But

The court said, there was no good reason for the distinction, and that any bail were sufficient for the purpose of rendering the defendant, without justifying (a).

The rule therefore was made absolute to set aside the attachment.

(a) [See *Reg. Gen. K. B. T.* 33 *Gen. 3.* 5 *Term Rep. B. R.* 368.]

1791.

Thursday,
June 3d.

ROUSE v. BARDIN and

Where a cause having been once tried, a new trial is granted, but a juror withdrawn, on the party, who gained the verdict at the first trial, undertaking generally to pay the other his costs, such an undertaking includes only the costs of the second trial.

AT the first trial of this cause the plaintiff undertaking "to pay the day" were the words of the order of *Nisi*. the prothonotary refused to allow the first trial, though the verdict obtained set aside. In consequence of this, *Rouse* a rule to shew cause why the taxation and the costs of the first trial allowed to

The court held clearly, that the rule extended only to the costs of the first ground refused the rule (b).

(a) *Ante*, 351.

(b) This determination was founded solely on the plaintiff. But the practice of the court is, that where the verdict, has also the second, the prothonotary allows the first verdict is for one party, and the second for former trial are not allowed. I have been favoured with this rule of practice. *Parker v. Wells, East.* *pals* was tried at *Croydon* by a special jury, and a verdict next term, a motion was made for a new trial, on the evidence, and a new trial granted, the rule being second time in *Middlesex* by a special jury, and a verdict. An application was again made for a new trial, in the opinion of the court of King's Bench on the point with the consent of the parties, and to save expence made a rule that judgment should be entered for the that a special verdict should be agreed upon. In taxation the prothonotary disallowed the costs of the first trial, and with which the plaintiff's attorney being dissatisfied, review the taxation. Lord *Loughborough* at first seen trial ought to have been allowed, but directed the plaintiff what was the practice in the King's Bench. Upon King's Bench the costs of the first trial were not allowed followed the first (d), the court said the prothonotary rule.

(c) 1 Term Rep. B. R. 34. *Cooke's Bankrupt Law*

(d) See *Mason v. Shurray*, Dougl. 438. and *Hanke* [But see *Außen v. Gibbs*, 8 Term Rep. B. R. 619. and

1791.

BROOKS v. ROGERS.

Monday,
June 7th.

ASSUMPSIT by the indorsee of a bill of exchange against the drawer, with the usual money counts. *Non assumpsit* and the general plea of bankruptcy. The facts of the case, as stated in the argument, were these: The defendant, on the 7th of May 1788, drew the bill in question for 100 l. on one *Hughes*, payable 45 days after date, in favour of the plaintiff, merely for the purpose of raising money. This bill the plaintiff indorsed in blank, and without tendering it for acceptance, discounted it at the *Olney Bank* on the credit of his own name, and paid the money over to the defendant. On the 16th of May the defendant committed an act of bankruptcy. On the 23d a commission issued, and on the 18th of June the certificate was allowed. When the bill became due, *Hughes* having no effects of the drawer in his hands, refused to pay it, upon which the *Olney Bank*, in whose possession it remained, called on *Brooks* for repayment of the money which had been advanced in discounting the bill. *Brooks* accordingly repaid the money, took back the bill, and now brought this action against the defendant. At the trial, which came on at *Westminster*, at the sittings after *Hilary* term, 1790, before Lord *Loughborough*, a verdict was taken, subject to the opinion of the court, whether the action was barred by the certificate.

A. draws a bill of exchange on B. in favour of C. who indorses it to D. who discounts it. Before the bill is due, A. becomes a bankrupt and obtains his certificate. When the bill is due, payment is refused: upon which C. refunds the money to D. which was advanced in discount, and takes back the bill. So an action brought by B. against A. on the bill, A. cannot plead his bankruptcy.

In *Easter* term following a rule was granted to shew cause why the verdict should not be entered for the defendant. Against which, *Adair* and *Lawrence*, Serjts. shewed cause, arguing, that though the holders of the bill might have proved a debt under the commission, yet the plaintiff *Brooks* could not, till he actually paid the money, which was after the allowing of the certificate; that this could not be considered in any other light than as a contract of indemnity, it not being certain when *Brooks* indorsed the bill to the *Olney Bank*, that the drawee would refuse payment. In support of these positions were cited the following authorities: 3 *Wils.* 13. *Cbilton v. Whiffin*, id. 262. *Goddard v. Vanderheyden*, id. 346. *Young v. Hockley*, *Cowp.* 525. *Taylor v. Mills and Magnall*, and *Johnson v. Spiller*, *Doughl.* 167. *last edit.*

In support of the rule, *Le Blanc*, Serjt. contended, that the drawer of a bill of exchange immediately contracted a debt

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upon

1791. upon drawing the bill, it was *debitum futuro*. If it were a debt owing by the that time, who might have proved it, it rupt ought not to be injured by the bi another. The cases cited on the other to indemnify.

BROOKS
v.
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The cause having stood over to thi unanimously of opinion, that the plain cover, notwithstanding the certificate. not confined to an express indemnity the ground that the plaintiff could prc actually paid the money, and the payme ruptcy (a).

(a) See *Hancock v. Entwistle*, 3 Term Rep. B. 1
4 Term Rep. B. R. 714.]

Monday,
June 7th.

Where a cause is twice tried, and the verdict is found on each trial for the same party, he is intitled to the costs of both; but where the verdicts are found for different parties, the costs of the first trial are not allowed (1).

TRELAWNEY v. THO

IN this cause there were two trials, found for the plaintiff, and the costs him by the prothonotary, the rule for entirely silent as to costs. But now *W* rule to shew cause why the taxation shou the ground that Mr. Justice *Wilson* (b), b was had, when the second trial was opinion that he ought to have nonsuited the second trial was granted under i parties. But

The court held that ground to be insuff rule; at the same time confirming the p in *Parker v. Wells* (c) that where the the verdicts are the same way in each, th they are found, is intitled to the costs of the verdicts are different ways, there ti trial are not allowed.

(a) *Ante*, 303.

(b) Who sat for Lord *Loughborough* at *Guild*.

(c) *Ante*, 639. n.

(1) [See *Austen v. Gibbs*, 8 Term Rep. B. 1

THE END OF EASTER

C · A · S · E · S

ARGUED AND DETERMINED

1791.

IN THE

Court of COMMON PLEAS,

IN

Trinity Term,

In the Thirty-first Year of the Reign of GEORGE III.

PICKWOOD v. WRIGHT.

Monday,
July 4th.

IN this action of assumpsit the plaintiff took a verdict for 611 l. which was really the sum due to him, and entered up judgment for that sum besides costs, but the damages laid in the declaration were but 600 l. A writ of error was brought on this judgment, and *Kerby*, Serjt. obtained a rule to shew cause why a *remittitur* of the 11 l. should not be entered. *Adair* and *Le Blanc*, Serjts. argued against the rule, saying, that after judgment signed and error brought, it was too late to enter a *remittitur* for the sum which caused the error; and they cited the case of *Sandiford v. Bean*, B. R. Hil. 13 Geo. 3. (a), as an authority in point. *Kerby*, on the other side, insisted, that as long as the record remained in court it might be amended.

Where a verdict is given for a greater sum than the amount of the damage laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error.

The court thought it was reasonable to allow the amendment, and therefore made the rule absolute upon payment of the costs of the writ of error (b).

(a) Cited in 2 *Bac. Abr.* 5, *last edit.* and is as follows: "If the jury give more, the plaintiff must relinquish the *extra* damages, for if he enters up the judgment for the whole which the jury give, it is error, and cannot be amended or helped in any manner. So determined in B. R. H. 1773, *Sandiford* and *Bean*, Esq."

(b) The defendant pleaded the statute of limitations, and the time was so far elapsed, that a fresh action could not have been brought, if the judgment had been reversed on the writ of error.

1791.

Friday,
July 8th.SMITH on the Demise of Lord STOURTON and Others,
v. HURST.

Service of a declaration in ejectment, before the effoign day of the term, on the daughter of the tenant in possession, in the absence of the tenant and his wife, is good, provided it appears, by the acknowledgment of the wife, that the daughter delivered it to her, though it should not appear that such delivery was before the effoign day.

AD AIR, Serjt. moved for judgment against the casual ejector, on the following circumstances: On the 18th of June last the attorney went with the declaration in ejectment to the house of the tenant in possession, but not finding either him or his wife at home, left it with his daughter, and at the same time acquainted her with the contents and meaning of it. On a subsequent day, the attorney called again at the house, when he saw the tenant's wife, (the tenant himself being then also from home,) and inquired of her whether she had received the declaration which was left with her daughter: she answered she had received it, and shewed it to the attorney, who read it over to her, and explained it. She then said, that her husband had not been at home since the paper was delivered to her daughter; but that she would send it to him.

The court were at first much inclined to refuse the rule, because it did not clearly appear from the affidavit, that the declaration came to the hands of the wife before the effoign day of the term; but the case of *Goodtitle v. Thrusout, Barnes*, 183. (a) being cited, on the authority of that case they made the

Rule absolute (b):

(a) Last edit.

(b) [See 1 *Bosj. & Pull.* 384. where the court refused to admit the acknowledgment of the tenant's wife to bind the tenant.]

Monday,
July 11th.

HARVEY v. RICHARDS.

Where in an action of assumpsit on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant shall not take advantage of his own mis-pleading in arrest of judgment.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 49*l.* 16*s.* 9*d.* the second count was for money lent and advanced; the third for money paid, laid out, and expended; the fourth for money had and received; and the fifth, on an account stated. Plea, that the defendant "*does not owe* to the said John (the plaintiff) the said sum of 49*l.* 16*s.* 9*d.* above demanded, *by virtue of the said bill of exchange* or any part thereof, in manner and form as the said John hath above thereof complained against him, and of this he puts himself upon the country," &c. but no notice was taken of the other counts. On this plea, the plaintiff joined

issue

issue and gained a verdict. And now, *Marshall*, Serjt. obtained a rule to shew cause why the judgment should not be arrested, on the ground that the plea of *nil debet* to the first count was bad, and that as there was no plea to the other counts, there was a discontinuance.

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 HARVEY
 RICHARDS.

Adair, Serjt. shewed cause, arguing, that supposing these objections were well founded in themselves, they were cured by the verdict, for which purpose he cited the following authorities, *viz.* *Aleyn*, 76. 1 *Brownl.* 8. *Glover v. Taylor*, *Cro. Eliz.* 470. *Corbyn v. Brown*, *stat.* 32 *Hen.* 8. c. 30. *Cro. Eliz.* 455. *Chamberlayn v. Nichols*, *Cro. Car.* 25. *Knight v. Harvey*, 1 *Lev.* 142. *Elrington v. Doshant*, 3 *Lev.* 374. *Sedgwick v. Richardson*, *Salk.* 218. *Carter v. Davies*, 2 *Stra.* 1022. *Marshall v. Gibbs*.

Marshall, Serjt. in support of the rule, contended, 1. That this was a discontinuance of the whole action, by which the plaintiff was out of court.

2. That it was not cured by the verdict.

1. It is a settled rule of law, that every suit, whether civil or criminal, ought to be continued from its commencement to its conclusion, without any gap or chasm, 2 *Hawk. P. C.* 298. If the defendant plead to part, he must traverse the other part, because the other matter remains still a fact to be tried by a jury, there being no question of law moved concerning it. But if the plaintiff do not pray judgment for the part unanswered, it is a discontinuance by him, because he does not insist on the judgment of the court for want of an answer, nor has he put the matter unanswered into any proper way of examination. The matter then not being put in a way of examination by the defendant, nor prayed by the plaintiff to be adjudged as admitted by the defendant, it is a question out of court, since the plaintiff by not following it to a proper determination has discontinued it. *Gilb. Hist. C. P.* 61. 134. 158. If the plea begins with an answer to *the whole*, but the matter pleaded is in truth only an answer to *part*, the whole plea is nought, and the plaintiff may demur; but if the plea begin only as an answer to *part*, and is in truth only an answer but to *part*, the plaintiff must not demur, but take judgment by *nil dicit* for the part unanswered, for if he demur or plead over, the whole action is discontinued. 1 *Salk.* 179, 180. *Weeks v. Peach*, and *Market v. Johnson*. But if the plaintiff take judgment by *nil dicit*, it must be in the *same term*. *Stra.* 302. *Woodward v. Robinson*. If one penny be left unanswered, it is a discontinu-

1791. *ance. Ibid. 303. Nichols v. Backhouse.* If a trespass in one of three closes be left unanswered, it is a discontinuance and not cured by any of the statutes of jeofail. *Carter, 51. Ayre v. Glossam.* The *venire* was returnable the 23d of *October*, and the *distringas* tested the 24th, by which there was a chasm of one day in the process: On motion in arrest of judgment, it was holden to be a discontinuance and not amendable. 1 *Salk. 51. The Queen v. Tutchin.*

HARVEY
v.
RICHARDS.

2. This being then a clear discontinuance, the next question is, Whether it is cured by the verdict? By stat. 32 *Hen. 8. c. 30.* after verdict judgment shall proceed notwithstanding any discontinuance, &c. But the verdict which will cure a discontinuance, must be a perfect one, such as the court may give judgment upon between the parties. *Gilb. Hist. C. P. 155, 156.* For if the verdict itself make a discontinuance by finding only part of the declaration, and nothing to the other part, this is a discontinuance not cured by the statute: because the intent of the issue is, that the whole event of the matter in issue shall be determined, and the answering to part does not answer the precept of the court, nor to the design of the issue, which is to determine the whole cause, 'that so it may be a bar to any other action. *Gilb. Hist. C. P. 156.* It would therefore be absurd to suppose, that a verdict as to part of the declaration on which the court can give no judgment even for that part, which does not go to the whole merits of the case contained in the declaration, should cure a discontinuance. The verdict here is, that the defendant *does owe to the plaintiff 49l. 16s. 9d. above demanded by virtue of the said bill of exchange.* But it is not alleged in the first count that the defendant was indebted. This being an action at the suit of an indorsee, debt would not lie; there is therefore no colour for the plea of *nil debet*, or to say that it is an answer to the count. The verdict in *assumpsit* is, that the defendant "did undertake and promise in manner " and form as the plaintiff hath declared," and the damages are assessed by occasion of the "not performing the within promises " and undertakings," &c. The judgment there is that the plaintiff do recover his *damages by the jury assessed*: But how can judgment be given that the plaintiff recover his damages by the *jury assessed*, when the jury have assessed *no damages*? If the jury, on this issue, find any damages, those damages must be for the detention of the debt due on the bill and not for the sum itself, as is the course on the plea of *non assumpsit*. Upon the whole

whole then, as there is no verdict on which the court can give judgment for the plaintiff, the discontinuance is not cured, and the cause is out of court, the judgment therefore must be arrested: for if one of the parties is out of court, there cannot be a repleader. 2 *Ld. Raym.* 923.

The court held, that the defect was cured by the verdict; for the defendant should not take advantage of his own mispleading, to defeat the plaintiff's suit, when the jury had found that he owed the debt due on the bill of exchange.

Rule discharged.

1791.

HARVEY
v.
RICHARDS

SUMNER v. BRADY, CARTWRIGHT, and FENTON.

Monday,
July 9th.

DEBT on bond for 400*l.* Plea of the defendant *Brady*, *non est factum*, on which issue was joined. 2. That he ought not to be charged with the said debt, by virtue of the said writing obligatory, because he says, that he before the suing out of the commission hereafter mentioned, to wit, on the 1st of *December* 1789, at *Westminster* aforesaid, being a dealer and chapman, and seeking his trade of living by buying and selling, and being also indebted to one *Edward Francis Burke* in the sum of 100*l.* and upwards, became and was then and there a bankrupt, within the intent and meaning of the several statutes concerning bankrupts; and that thereupon a certain commission under the Great Seal of *Great Britain*, bearing date at *Westminster* aforesaid, the 21st of *December* in the same year, grounded upon the said several statutes or some or one of them, was then and there duly awarded, and issued, upon the petition of the said *Edward Francis Burke* against him, directed to certain commissioners therein named, thereby giving full power and authority to the said commissioners, four or three of them, to execute the same, as in and by said commission (relation being thereunto had) will more fully appear. By virtue of which said commission, and by force of the statutes aforesaid, the defendant was afterwards, to wit, on 26th *December* in the year aforesaid, at *Westminster* aforesaid, duly adjudged and declared to be a bankrupt; that afterwards, to wit, on the day and year last aforesaid, at *Westminster* aforesaid, due notice was given and published in the *London Gazette*, that such commission had been awarded and

A bond given to a creditor of a bankrupt, in order to induce him to withdraw a petition which he had preferred to the chancellor against the allowance of the certificate, is void by stat. 5 Geo. 2. c. 30. s. 11.

1791. issued against him, and that he had been declared bankrupt, and certain times were duly appointed by such notice, for admitting the proof of any of his creditors' debts at the *Guildhall*, in the city of *London*. That afterwards, to wit, on 1st *October* 1790, at *Westminster* aforesaid, three of the commissioners named in the said commission, certified in writing under their hands and seals, to the Lord High Chancellor of *Great Britain*, that the defendant had made a full discovery of his estate and effects, and in all things conformed himself to the several statutes made and then in force concerning bankrupts; and particularly to the directions of the statute in that behalf made in the 5th year of his late majesty's reign, and that there did not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of all the estate and effects of the defendant. That before the making of the said certificate by the said commissioners, four parts in five both in number and value of the creditors of the defendant, who were creditors for not less than 20*l.* respectively, and had proved their debts under the said commission, had duly signed the said certificate, and testified their consent thereto, and to the discharge of the defendant, in pursuance of said last mentioned act of parliament; which was also in due manner certified by the said commissioners, to wit, at *Westminster* aforesaid. And the defendant having afterwards, to wit, on day and year last aforesaid, at *Westminster* aforesaid, made oath that such certificate and consent of the said creditors thereunto, had been obtained fairly and without fraud, the said certificate was then and there laid before the Lord Chancellor for allowance and confirmation. That the plaintiff being a creditor of the defendant, afterwards, to wit, on day and year last aforesaid, at *Westminster* aforesaid, preferred a petition (a) to the said Lord Chancellor, against the allowance and confirmation of the said certificate of the defendant, who before, and at the time of preferring the said petition, was detained in prison, and in execution there by and at the suit of the plaintiff: and thereupon, afterwards and whilst the defendant was so detained in prison as aforesaid, and before the allowance and confirmation of the said certificate, to wit, on the day and year in the said declaration mentioned, at *Westminster* aforesaid, it was *unlawfully consented to and agreed* by and between the defendant and the

(a) It was stated in the petition, that many of the persons who signed it were not creditors of the bankrupt, but had made false affidavits of debts in order to make up the number of four-fifths, and had received money for so doing.

plaintiff

plaintiff that such writing obligatory as is mentioned in the said declaration should be sealed and executed, and together with certain other securities, should be delivered to the plaintiff, and that the plaintiff in consideration thereof, should thereupon discharge the defendant from his said imprisonment, *and also withdraw the petition so preferred by him against the certificate as aforesaid, to the intent that the allowance and confirmation thereof by the Lord Chancellor might be obtained:* that the said writing obligatory was afterwards, to wit, on day and year last aforesaid, at *Westminster* aforesaid, sealed, executed, and delivered to the plaintiff, and by him accepted, taken, and received, in pursuance of the said agreement, and for the considerations aforesaid, before the allowance of said certificate of the defendant, (which has since been obtained accordingly,) whereby the said writing obligatory in the said declaration mentioned *is wholly void and of no effect*, and this the said defendant is ready to verify, &c. &c.

3. That the said writing obligatory was executed and delivered to the plaintiff for securing the payment of a certain debt or sum of money due to him from the defendant at the time of his so becoming a bankrupt, with intent to persuade the plaintiff to consent to the allowance and confirmation by the Lord High Chancellor of a certificate from the major part of the commissioners, that the defendant had conformed himself in all things to the said statutes, and to *withdraw a certain petition* preferred by the plaintiff to the said Lord Chancellor, against the allowance and confirmation of such certificate, to wit at *Westminster* aforesaid, and that the said writing obligatory was accordingly there taken and accepted by the plaintiff, upon the occasion and for the considerations aforesaid, and for no other consideration whatever, &c. &c.

Plea of the defendants *Cartwright* and *Fenton*. That the defendant *Brady*, before the making of the said writing obligatory had become, and was a bankrupt within the several statutes concerning bankrupts, to wit at *Westminster* aforesaid, and that at the time of the making thereof, no certificate from the commissioners named in the commission against the defendant *Brady*, or from the major part of them, of his conformity to the said statutes had been allowed and confirmed according to the provisions therein contained in that behalf; and further, that the said writing obligatory was executed and delivered to the plaintiff for securing the payment of a certain debt or sum of money due to him from the defendant *Brady*, at the time of his so becoming

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v.
BRADY:

1791. becoming bankrupt, with intent to persuade the plaintiff to consent to the allowance and confirmation by the Lord High Chancellor of a certificate from the major part of said commissioners, that the defendant *Brady* had conformed himself in all things to the said statute, to wit, at *Westminster* afore said, and that the said writing obligatory was accordingly there taken and accepted by the plaintiff upon the occasion, and for the considerations afore said, &c. &c.

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Replication to the defendant *Brady's* pleas. To the second, That the said writing obligatory was sealed and delivered by the defendant *Brady*, upon and for a certain good and valuable consideration, to wit, at *Westminster* afore said, in the county of *Middlesex* without this, that it was unlawfully consented to and agreed by and between defendant *Brady* and plaintiff, in manner and form as in said second plea is above in that behalf alleged, to the intent in said second plea in that behalf also alleged, and this the said plaintiff is ready to verify, wherefore, &c. &c. To the third, that the said writing obligatory in the said declaration mentioned, was executed and delivered to the plaintiff upon and for a certain good and valuable consideration, moving from him said plaintiff to the defendant *Brady*, and not for securing the payment of a certain debt or sum of money due to the said plaintiff from the defendant *Brady* at the time of his becoming bankrupt, with the intent in the said last plea in that behalf above mentioned, in manner and form as the defendant *Brady* hath above in his said last plea in that behalf alleged; and concluded to the country, whereupon issue was joined.

Replication to the defendants, *Cartwright* and *Fenton's* plea, that the said writing obligatory was executed and delivered to the plaintiff upon and for a good and lawful consideration, and not for securing the payment of a certain debt or sum of money due to the plaintiff from the defendant *Brady* at the time of his becoming bankrupt, with the intent in the plea of the defendants *Cartwright* and *Fenton* in that behalf above alleged, in manner and form as they have above in their said plea in that behalf alleged, and concluded to the country, whereupon issue was joined.

Rejoinder by *Brady* to the replication to his second plea, that it was unlawfully consented and agreed by and between the defendant *Brady* and the plaintiff, in manner and form as in the said second plea is above in that behalf alleged, to the intent

in the said second plea in that behalf also alleged, and concluded to the country, whereupon issue was also joined.

1791.

This cause came on to be tried at the sittings in the present term, when a verdict was found for the plaintiff on the first issue, for the defendant on the second, and with respect to the other issues, the verdict was to be entered as the court should direct.

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A rule having been granted to shew cause why judgment should not be entered generally for the plaintiff, *Bond* and *Le Blanc*, Serjts. were going to shew cause, when they were stopped by the court, who desired to hear what could be said in favour of the rule. Upon this *Adair*, Serjt. urged that the withdrawing an opposition to a certificate was not such an *act* as was necessary for the bankrupt's discharge within the stat. 5 Geo. 2. c. 30. and relied on the case of *Lewis v. Chase*, 1 P. Wms. 620. which he said had never been expressly denied, though in some degree shaken by subsequent decisions. And *Marshall*, Serjt. argued in the following manner:

The question is, Whether under the circumstances stated in the first special plea, the bond given by the defendants to the plaintiff be void, as being within the 5 Geo. 2. c. 30. s. 11. If it be void, it must be either within the *words* or the *meaning* of the statute. 1. It is not within the *words*. The statute provides, that every security given by a bankrupt, for a debt due at the time of his bankruptcy, "as a consideration, or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, shall be wholly void and of no effect." It is said, that *consent* must mean something different from *signing*, and that withdrawing the petition was a consent. But all the cases shew, that the consent meant by the statute is that which is expressed by the signature of the creditor to the certificate. In this manner the statute has been interpreted by different judges; by *Aston*, J. in *Trueman v. Fenton*, Cowp. 550. and by Lord *Mansfield* in *Browning v. Morris*, Cowp. 792. and *Smith v. Bromley*, Dougl. 698. (a) The 24 Geo. 2. c. 57. s. 9. explains the meaning of the word *consent*. It recites that "many abuses have been committed by bankrupts and persons, who with their privity, have attempted to prove fictitious and pretended debts under commissions of bankruptcy, in order that such persons might be enabled to sign their consent to the certificates for discharging such bankrupts from their debts," &c.

(a) Last edit.

1791. becoming bankrupt,
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BRADY.

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joined.

Rejoinder by *Brady* to the
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rupt, unless it be obtained agreeably to the directions of the statute. This is no hardship on the bankrupt; the certificate would not have existed if it had not been obtained by means which the Legislature has reprobated. If it be an injury to the public to withdraw a petition, then every man might petition. But no man is allowed to petition without swearing to a debt. The creditors, therefore, are the only persons interested in such a petition: but as every creditor has an equal right to petition, and no one obliged to petition for the others, any creditor may either prefer or withdraw a petition without injuring the others. Suppose the object of the bankruptcy were to defeat a particular creditor, and that creditor the only one who had not signed the certificate; suppose too that a number of fictitious creditors had signed it in order to make up the four-fifths in number and value; in such a case the only remedy would be by petition. That petition could affect the interest of none but himself, since all the other creditors had signed and consented to the certificate. Why then, if it be not within the strict letter of the statute, deprive an honest creditor of the means of compelling the bankrupt to be honest? All the creditors may agree not to examine a bankrupt touching a particular sum with which he is charged, in consideration of a promise to pay that sum to the assignees for their benefit, because all the creditors are all the persons interested, according to Lord Kenyon, in *Nerot v. Wallace*, 3 Term Rep. B. R. 23. If a creditor signs his consent to a certificate, he holds out to the world, that the bankrupt has demeaned himself honestly, and that he has agreed to take his share of the dividend publicly made. Any thing done privately, contrary to that declaration, is a fraud on the other creditors, and on the public at large. But withdrawing a petition after a creditor is satisfied, is merely ceasing to oppose a measure from which he has no longer any reason to apprehend an injury to himself. Suppose a statute were passed which made it penal to do any act, "to the intent that a bankrupt might obtain his certificate," and in an action for the penalty the declaration were to state, that the bankrupt's certificate was before the chancellor for confirmation, and that the defendant had prepared a petition against it, but afterwards, in consideration of a sum of money, *desisted from presenting the petition*, this would be clearly a bad declaration; the conduct of the defendant being merely negative, could never be construed into an act done to the intent that the bankrupt might obtain

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1791. *obtain his certificate.* The present plaintiff did an act to obstruct the defendant in obtaining his certificate, which he was not bound to do, and afterwards desisted from obstructing it which he had a right to do. Suppose a man attempts to rob me and I secure him, and I am afterwards prevailed upon to let him go, having at the same time no doubt but that he will return to his former courses; can it be said that I let him go, *to the intent that he might rob others?*

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The bond was not obtained by any oppression or undue advantage taken of the bankrupt. If the bankrupt had fairly conformed and had a right to his certificate, the petition, whatever might be contained in it, could not prevent his having the certificate. But if, on the other hand, the petition was well founded, and shewed that the bankrupt being guilty of fraud was not intitled to his certificate, and he gave the plaintiff a new security for his whole debt to induce him (the plaintiff) to withdraw the petition; this is a confession that the allegations of the petition were true. The bankrupt then being clearly convicted of fraud by his own plea, and that he was not intitled to his certificate, he has only given a new security for a debt which he was bound in conscience to pay, and which he must have paid before he could be freed from prison. It follows therefore, that instead of being an oppression on the bankrupt, it was a benefit to him, by releasing him from a gaol, and giving him farther time for the payment of his debt. But if this case be not within the letter of the act, and if it appear that the bankrupt must have been guilty of fraud towards the plaintiff, the court will not extend the statute in his favour, nor give it an equitable construction in order to relieve him. The case of *Small v. Brackley*, 2 Vern. 602. shews that even a court of equity would not do this, and still less will a court of law do it. On the contrary, a court of law ought not, in such a case, to go beyond the letter of the statute. If the case be within the equity of the statute, the defendant may have recourse to a court of equity, and the plaintiff will there have an opportunity of shewing such circumstances as will satisfy the court that the bond ought strictly to be enforced. But the case of *Lewis v. Chase* (a) is directly in point, and shews that both in law and equity this is a good bond. That case, it is said, has been over-ruled or shaken. But if the cases in which it is mentioned be examined, it will be found to be neither

(a) 3 P. Wms. 620.

over-ruled nor shaken. Lord *Mansfield* always distinguishes it from those cases which it seemed to resemble, and in some instances directly acknowledges its authority. In *Trueman v. Fenton* (a) it was strengthened, and Lord *Mansfield* partly relies on it. The case of *Smith v. Bromley* (b) was a case of money taken for signing the certificate. *Jones v. Barkley* (c) went on the idea that the money was paid for signing. In *Spurret v. Spiller* (d) and *Cockshot v. Bennett* (e) a security was taken for the residue, for signing a deed of composition.

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Lord LOUGHBOROUGH.—There could not be a more unfavourable case than the present come before a court. There is an enormous fraud evident upon the face of it, a number of persons having committed perjury by swearing to debts, who were not real creditors of the bankrupt. The plaintiff presented a petition against them which he ought to have pursued. Instead of that, he is induced to suppress his petition in order to gain his own debt, while all others are barred by the certificate which is procured by his suppression; and this under a law made to prevent fraud, and to secure an equal advantage to all the creditors. But whether the case be favourable or unfavourable is quite out of the question; the court is bound to declare what is the true construction of the law. The argument on the part of the plaintiff rests on the case of *Lewis v. Chase*; but the impression on my mind is that this case has been long exploded, and upon considering it with reference to the statute, it seems to me to be a case totally unprincipled, and directly contrary to the true construction of the act. That case cannot stand unless some words be erased from the statute, or a meaning assigned to them entirely repugnant to the whole principle of the act. A distinction is attempted to be made from that case, between the act of giving money for the consent of the creditor to sign the certificate, and that of giving him money to withdraw his opposition to it; as if the former act were only to be condemned. But see how the act of withdrawing an opposition stands, compared with the actual signing the certificate. The argument urged is, that as it is a voluntary act, the creditor may do as he pleases. But the law feels it a mischief and a subversion of the bankrupt laws, to traffick with them and the power given by those laws. See the consequences.

(a) *Cowp.* 544.(c) *Dougl.* 696. last edit.(e) 2 *Term Rep. B. R.* 763.(b) *Dougl.* 696. last edit.(d) 1 *Adk.* 105.

A bank-

1791: A bankrupt labours to get a sufficient number of creditors to procure a certificate: a principal creditor knowing what will prevent the certificate stands by and petitions: now if the argument were allowed, it would fetch more at the market, it would be a more valuable traffick to withdraw an opposition to the certificate, than to sign a consent to it, as one out of four-fifths of the creditors in number and value. See too how the act expresses itself (a). No person becoming bankrupt shall be intitled to the benefit of the act unless the certificate be allowed by the Great Seal, and unless four parts in five in number and value of the creditors "shall sign such certificate and testify their consent to such allowance and certificate." And after a power given to any creditor to oppose the certificate, comes the clause in question; that every bond, bill, &c. given as a consideration, or to the intent to persuade him, her, or them "to consent to or sign any such allowance or certificate, shall be wholly void and of no effect." Now according to the argument, the act ought to have left out the words "consent to" as being idle words at best, and retained only the word "sign." But being in the statute, do they mean any thing? I think they clearly mark the cases of signing the certificate, and of an opposition made to it, as distinct cases in the contemplation of the Legislature. Where words may have an operation, they ought not to be rejected. (b) Lord Macclesfield seems to me to have taken a liberty with the statute which was totally unfounded, for he argues as if it were to be applied to no case but that of signing the certificate. But I have no scruple in saying that any case is not law, which I think is contrary both to the words and the true spirit and policy of an act of parliament. When a case is merely cited in argument, perhaps a court may not directly decide it not to be law, unless the very point of it is in discussion; but the oftener the case of *Lewis v. Chase* has been cited, the more it has been doubted, and I think it entirely inconsistent with *Cockshott v. Bennett* (c), which I hold to be a right determination. The reasoning also in *Robson v. Calze* (d) is applicable to the present case. I do not enter more at large into the general argument, because I think the case is directly within the act of parliament.

GOULD, J. of the same opinion.

HEATH, J. of the same opinion. If this transaction which is admitted to be fraudulent, affected only the parties, it would

(a) Stat. 10.

(c) 2 Term Rep, B. R. 763.

(b) *Lewis v. Chase*, 1 P. Wms. 620.

(d) Dougl. 227. last edit.

be a different question. But this is a fraud affecting the other creditors, and against the policy of the law. It is a matter of choice whether a creditor will prefer a petition, but having preferred it, he ought not to withdraw it so as to injure the other creditors. So it is competent to any man, unless bound in a recognizance, to prefer an indictment for felony, or not, at his option; but when he has preferred it, he cannot stipulate for his own private advantage, and compound. The reasoning upon which the cases go is, that the money either comes out of the bankrupt's own fund, and then there is a fraud on the other creditors, or it is raised by his relations, and then an undue advantage is taken of the situation of the bankrupt to extort money from them. This cuts up by the roots the case of *Lewis v. Chafe*.

WILSON, J. of the same opinion. I think this case within the act of parliament: but if it were doubtful, the general principle of the bankrupt laws ought to induce the court to adopt the construction now put upon the act. The intent of the Legislature was, that all the bankrupt's property should be equally distributed among his creditors, and that being done, that he should have a full discharge. The statute directs in what manner the certificate shall be allowed, that four-fifths of the creditors in number and value shall sign it and testify their consent to its allowance: that the commissioners shall certify that it was without fraud; and then that any of the remaining creditors may petition against the confirmation of the certificate. After this comes the general clause, which makes any security void, given as a consideration, or to the intent to persuade a creditor to consent to or sign any such allowance or certificate. Now, I think this clause, by a fair construction of the words includes the present case: the statute says, "consent to or sign," and I construe the withdrawing the petition to be a consent.

Judgment for the defendant (a).

(a) [That the certificate is void if any | though without the privity of the bankrupt, one creditor is induced by money to sign it, | see *Holland v. Palmer*, 1 B. & P. 95.]

O'CONNOR v. MURPHY.

Wednesday,
July 13th.

A Rule was obtained by *Adair*, Serjt. to shew cause, why the costs of a nonsuit in an action of *trower*, brought by *Murphy* the present defendant, against one *O'Loughlin*, should which are borne by C and D. but A. is nonsuited. Afterwards C. brings an action against A. in which D. is interested as well as C. and C. is nonsuited. The costs of the one nonsuit may be set off against the other.

A brings an action against B. the expenses of defending

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1791. O'CONNOR
v.
MURPHY. not be set off against the costs of a nonsuit in this cause. It appeared that the action of *trover* had been brought for a ship claimed by *Murphy*, but which proved to be the joint property of O'Connor, the present plaintiff, and one O'Sullivan, (who were partners in trade,) and of which O'Loughlin was the master. The present action was brought by O'Connor as indorsee of a promissory note against *Murphy* as drawer, in which O'Connor was nonsuited: and he now made this application, upon the ground, that the action against O'Loughlin was defended at the joint expence of O'Connor and O'Sullivan, and that O'Sullivan was interested together with O'Connor in the promissory note, on which the present action was brought.

Marshall, Serjt. shewed cause; he said, the courts had in several instances (a) after the statute of set off, refused to allow the costs of one action to be set off against those of another; and the reason then given was, that it required the assistance of an act of parliament to enable the defendant in an action to set off a mutual debt, and that act did not extend to the case of costs. Afterwards however, by a sort of equitable interpretation of the statute, the courts allowed the costs of cross actions to be set against each other. But they had never allowed this to be done, where the costs were not mutual debts, and for the recovery of which there were not mutual remedies: for had they gone beyond that, they would have extended this equitable construction of the statute farther in a case for which it was evidently not intended, than in those cases for which it was expressly made. As O'Sullivan did not join in the action on the promissory note, he ought not now to be permitted to say that he was interested in it, merely to intitle himself to the benefit of a set-off: and as *Murphy* had a remedy only against O'Connor for the costs of the present non-suit, those costs were a debt due from O'Connor alone, and not jointly from O'Connor and O'Sullivan. Therefore supposing the costs of the action of *trover* could be taken as a debt due from *Murphy* to O'Connor and O'Sullivan jointly, yet even then the costs of the two non-suits could not be deemed mutual debts. This he said distinguished this case from *Nunes v. Modigliani*, ante, 217. and *Schoole v. Noble*, ante, 23. Besides, *Murphy* could not bring an action against O'Connor and O'Sullivan jointly for the costs of the present non-suit, neither could any person but O'Loughlin sue *Murphy* for the costs of the former one. The costs therefore of the two non-suits could not

(a) 2 *Sira*, 1203.

by any means be taken to be mutual debts. The cases of *Paynter v. Walker*, C. B. East. 4 Geo. 3. Bull. N. P. 179. *Ryal v. Larkin*, 1 Wils. 155. and *Ridout v. Brough*, Cowp. 133. shew that under the statutes of set off, where the defendant has an equitable claim on the plaintiff, however clear and just, yet if an action will not lie for it, at the suit of the defendant *alone*, and in *his own right*, against the plaintiff *alone*, and in *his own right*, it cannot be deemed a mutual debt, and therefore cannot be set off (a).

Lord LOUGHBOROUGH stopped *Adair*, who was going to reply, and said, that without any regard to O'Sullivan's interest in the promissory note, O'Connor was equitably intitled to the costs of the non-suit in the action of *trover* against O'Loughlin, and therefore he ought to be permitted to set them off, as far as they would go, against the costs in the present action.

Rule absolute.

(a) But see those cases, and *qu.* Whether they support this proposition in its full extent?

HAYNES v. HARE.

Wednesday,
July 13th.

THE facts of this case were as follow: In July 1780, *Robert Hare* and *Francis* his son, in consideration of 300 *l.* then paid to them by *William Haynes*, joined in a bond in the penalty of 600 *l.* conditioned for the payment of an annuity of 50 *l.* *per annum* to *Haynes*, his executors, administrators or assigns, during the life of *Francis Hare*. This bond was drawn in the usual form, *without mentioning in the condition any agreement to redeem the annuity*. A warrant of attorney was also given by the obligors to *Haynes*, to confess a judgment on the bond, and another warrant of attorney by *Francis Hare*, to enable *Haynes* to receive the annuity out of an allowance of 200 *l.* *per annum*, which his father *Robert Hare* made him. Judgment on the bond was entered up in this court as of *Trinity term* 1780. Sometime after *Haynes* died, and *Francis Hare* applied to his acting executor, for the purpose of *redeeming the annuity*, and tendered the principal sum, together with all arrears of the annuity and interest up to that time, amounting to 313 *l.* 19 *s.* This the executor refused to accept, alleging as a reason for his refusal, that his testator had specifically bequeathed the money arising from his annuities, and had given no power to the executors to redeem them: the executors therefore thought, that they could not safely consent to the

A. grants an annuity for his own life to *B.* to secure which, a bond and warrant are given, and judgment entered. *B.* dies. After his death the court will not admit evidence of a parol agreement between the parties that *A.* should be at liberty to redeem the annuity on certain terms, (especially if it be the evidence of the attorney concerned for *B.*) as a ground to order the securities to be given up, and

Satisfaction entered on the judgment.
redemption

1791. redemption of the annuity in question,
 a court of law or equity. In consequence
 HAYNES *Francis Hare* preferred a petition to the
 v. being then depending in Chancery respect
 HARE. to redeem; which was founded on the
Harborne, (the attorney who transacted
 annuity between the two *Hares* and *Hay*
 “ the deponent was first applied to by
 “ 1780, to raise the loan of 300 l. w
 “ procure without better security than w
 “ *Hare* being informed of this, directed
 “ way of annuity on his (*Hare*’s) life
 “ and said that he would get his father
 “ the annuity bond, and himself give t
 “ attorney to receive the annuity out of
 “ *per annum*, which was made him by
 “ *annuity should be granted on the express*
 “ *Hare should at any time be at full libert*
 “ *it, on giving 14 days notice of his intent*
 “ *of 300 l. and interest up to the day o*
 “ *and all papers relating to the annuity sh*
 “ *cancelled: that in consequence of this*
 “ applied to *Haynes* to purchase the ann
 “ the same time of the *conditions* menti
 “ to which *Haynes* agreed: that when t
 “ of attorney were executed, the *condi*
 “ *and again consented to by Haynes.*”
 the ground of the mode of the applica
 the question could not be decided on a
 filed a bill for the same purpose, in *Hilary*
 to which, the executors of *Haynes* del
 any conditions to redeem the annuity; a
 coming on to be heard before Mr. Justice
 the Chancellor,) he dismissed the bill, on
 evidence could not there be received i
 annuity bond, but recommended an appl
 which the judgment was entered.

These proceedings having been had,
Hilary term last, by this court, for the
 shew cause, why upon payment of the
 annuity should not be vacated, the bond
 ney given up to be cancelled, and satis

record of the judgment: This rule was obtained on an affidavit of *Harborne*, of the same purport as the deposition in Chancery above stated. It was afterwards enlarged till the present term, when *Kerby* and *Bond*, Serjts. shewed cause. After stating, and observing upon the particular circumstances of the case, they argued that it was a known principle of law, that matter *debors* a deed could not be pleaded in contradiction of it. *Preston v. Merceau*, 2 *Blac.* 1249. *Meres v. Ansell*, 3 *Wils.* 275. *Lord Irnham v. Child*, 1 *Brown Rep. Chanc.* 92. *Lord Portmore v. Morris*, 2 *Brown Rep. Chanc.* 219. Here the agreement for redemption stated in the affidavit, is contradictory of the condition of the bond: the condition is for the payment of an annuity during the life of *Francis Hare*, but if the agreement takes place, the payment will be only during his pleasure. Though it is true, that there are many cases where matter may be pleaded which does not appear upon the face of the bond itself; such as dures, infancy, usury, gaming, stock-jobbing, and the like, yet in all those cases, the averment goes to prove that the contract was originally void, and therefore that the instrument had no obligation from the beginning. *Collins v. Blantern*, 2 *Wils.* 347. But where a bond has once taken effect as a bond, it cannot be defeated by pleading a matter *debors*, as is observed by *Eyre*, Ch. J. *Andrews v. Eaton*, *Fitzgib.* 76.

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In support of the rule, *Adair* and *Runnington*, Serjts. contended, that this was not an application to alter a deed by matter *debors*, but merely to prevent a judgment continuing in force contrary to the agreement of the parties. The court has an equitable jurisdiction over its own judgments, and will enquire into the consideration on which they are founded; and it is the daily practice, if a judgment be entered up for a greater sum than is really due, for the court to interfere and order satisfaction to be entered on the roll for so much. The question then is, Whether they will not exercise that equitable jurisdiction in this case, according to the intent and agreement of the parties? And *Haynes* being dead, the next best evidence is that of *Harborne*. Neither can there be any hardship on the executors, who may now sell the annuity, after it has run ten years, at the same price for which it was originally purchased.

Cur. vult advis.

On this day Lord *Loughborough* delivered the opinion of the court. After stating the circumstances of the case, and the affidavit of *Harborne*, his Lordship proceeded thus:

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Under these circumstances, the application, on the ground that the security being on a warrant of attorney, it was in its sanction of the court, that the court having over it, would examine into the confidence entered up, and not permit the party to stand to receive more than in justice he is entitled to come before the court, as it fitly and properly avoids any prejudice at all from what has passed. For the application to the court of Equity, under circumstances very different from what is now the case, is not sufficient, on this species of application, by the authority which it is necessary to establish, whose records are made matters of security, and those securities which proceed on the same ground, which in fact was never brought. But exercising its authority with respect to judgment, the principle is clear, that in judging of the validity of the foundation of the judgment, they were governed by the same rules which the law of the transaction itself, independent of the judgment of the court in the form of an action. We have authority by having an authority over the judgment, and the decision of the question between the parties. To be sure, there is a strong inclination to grant redemption, in such cases, from circumstances generally understood. The small value of such annuities, is, in general, governed by the fact that when the party is in a situation to redeem, he has been fairly advanced, no obstruction being in being permitted to redeem on such terms. Another circumstance is, that the redemption is extremely advantageous to the party from the security redeemed; because if the price bears any relation to the subject matter, after the annuity has been paid, it is less valuable than at the time of the redemption, the life being so far spent. An idea has been suggested of an express agreement to redeem the security, and expose it to impeachment for usury by converting it in its appearance into a loan, to those apprehensions, (whether well or

cessary now to consider,) covenants for that purpose have not been inserted in the deeds (a). 1791.

Notwithstanding all these circumstances, the court feels itself in a situation, in the present case, in which it is impossible, consistently with the rules which have been wisely laid down, to permit the redemption and open the transaction. The person on whose part the judgment was entered up, is dead. The only evidence is the declaration of *Harborne* the attorney, that in all the general circumstances of the transaction, down to the final execution of the deeds between the parties, this condition for the redemption of the annuity was understood between them as perfectly agreed to. If *Haynes* were living, the court, considering the affidavit of *Harborne* his attorney who had entered up the judgment for him, would be under no difficulty to call upon *Haynes*. If he made an affidavit and admitted the fact, there would be no difficulty to oblige him as the plaintiff in the judgment to comply with the terms of the agreement, or in other words to set aside the judgment, and compel him to accept the redemption. If *Haynes* denied it and his affidavit denying the agreement asserted by the attorney were before the court, I rather apprehend that the court would find itself in a situation, in which it could not move at all; there would be affidavit against affidavit. In a situation of this kind, I think it would be difficult for the court to put the matter in any course of trial, in which *Harborne's* evidence would be suffered to overbalance *Haynes's* denial. If *Haynes* declined to make an affidavit, the court would give credit to *Harborne*. But *Haynes* is dead, and then the question is, Whether the court can permit terms not inserted in the deed which the parties have executed, to be added to the contract, of which this instrument is the full and explicit evidence? This brings me to the question which has been argued, Whether on the testimony of a witness to a parol communication between the parties, a term can be added to the contract, which does not appear in the instrument by which that contract is established? Several cases have been cited on this subject. The case of *Lord Portmore v. Morris* does not apply to this. For the evidence (b) in that case, though extremely strong, was the evidence of persons not concerned for *Rosoman*: there *Stubbs* and *Withy* were both treating on behalf of *Lord Portmore*, and *Jenkins* likewise attended on his behalf: the attorney on the other side was

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(a) See *Murray v. Harding*, 3 *Wils.* 370.

(b) The court after the argument desired to have copies of the depositions in *Lord Portmore v. Morris* laid before them.

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Exley, and he positively denied what was as positively asserted in the depositions of the others. He gave an explicit contradiction to the paper in which *Stubbs* had entered a memorandum of the agreement. (a) *Exley* was not examined as a witness, but being a trustee of the annuity he was made a defendant in the cause, and against the denial in his answer it seemed difficult for the court to have made any decree for the redemption, *Rosoman* being dead. But in the circumstances of these two cases, there is an essential difference: here there is the testimony of *Harborne* the attorney for *Haynes*, as to the terms of redemption agreed upon between the parties. It is not necessary to cite any case to prove the proposition, that parol evidence of a parol communication between the parties ought not to be received to add a term, not inserted in the specific agreement which they have executed; and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed. But it is said, that admitting the general rule, the particular circumstance of the testimony given by the attorney for the party forms an exception. The court would certainly feel itself under no difficulty, which way to act, if the party for whom *Harborne* was the attorney, were before the court; but he being dead, and no discovery appearing to have been made by him, the circumstance of the attorney for the party being a witness, to invalidate the security against the representative of his employer, seems to be a strong confirmation of the general rule. There is nothing so dangerous, as to permit deeds and conveyances after the death of the parties to them, to be liable to have new terms added to them, on the disclosure of the attorney in a matter in which he could meet with no contradiction. But this opinion is perfectly without prejudice to any application, which may be made in the life time of the party. I give no opinion how far the court might sanction such a requisition, on circumstances of this kind being disclosed. I wish to be understood as confining myself particularly to the mode of application, and to the

(a) This memorandum was dated on the day of the execution of the deeds, and signed by *Stubbs*, stating, that it was agreed by Lord *Permore* and *Rosoman*, previous to and at the execution of the deeds, that his Lordship should on payment of the 2000*l.* and half a year's annuity over and above that sum, have all the securities delivered up, and that the annuity should cease.

evidence

evidence by which it is supported in the present case. The court therefore must discharge the rule, but certainly without costs. 1791.

Rule discharged without costs a).

(a) [See *Pool v. Cabanes*, 8 Term Rep. B. R. 328. where the court of K. B. refused to relieve the grantor of an annuity after the death of the agent of the grantees, on the ground of circumstances which could only have been explained by the decaided.]

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SILL and Others, Assignees of SKIRROW a Bankrupt, *Wednesday, July 13th.*
v. WORSWICK.

ASSUMPSIT for money had and received to the use of the plaintiffs, with the usual counts. Plea, the general issue; which was tried before Mr. Justice *Wilson* at *Lancaster*, on the 27th of *August* 1787, when a special verdict was found in substance as follows:

That *William Skirrow* on the 2d of *January* 1782, exercised the trade of a woollen draper at *Lancaster*; that he was then indebted to one *James Pilkington* in 100*l.* and upwards, and on that day became a bankrupt; that on the 16th of *January* a commission issued on the petition of *Pilkington*, that on the 28th of *January* he was declared a bankrupt; that on the 5th of *March* an assignment was made of all his estates and effects, &c. to the plaintiffs: that before and when he became a bankrupt, he was indebted to the defendant *Worswick* in 230*l.* 17*s.* 7*d.* and that the said debt was contracted at *Lancaster* aforesaid, and at the time when it was so contracted and always afterwards both *Skirrow* and *Worswick* resided at *Lancaster*, which was their place of abode; that on the 4th of *January* the defendant *Worswick* knowing that *Skirrow* had become a bankrupt, did verify and prove by affidavit in writing, before the *Mayor of Lancaster* that *Skirrow* was indebted to him the defendant in 230*l.* 16*s.* and upwards, for money lent, &c. That on the same day and year last aforesaid the said affidavit was certified and transmitted under the common seal of the said borough of *Lancaster*, to one *Thomas Moore* and one *Luke Tyson* then being persons resident in the island of *St. Christopher*, which said island then and there, and before, and at the passing of a certain act of parliament made in the fifth year of the reign of our Sovereign Lord *George* the Second, intituled "An act for the more easy recovering of debts in his Majesty's plantations in *America*" and on the 29th day of *September*,

If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of debt in *England*, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the *West Indies*, the assignees may recover the money in an action for money had and received.

1791. *tember*, which was in the year of our Lord 1732, was and the
 forth hath been, and still is *one of the British plantations in America*
 that the defendant *Worwick* appointed the said *Thomas Moore*
Luke Tyson, so being resident in the said Island of *St. Christopher*
 his attornies to sue for, recover, and receive, *of and from the*
William Skirrow, or of, and from, all, or any of his fact
 agents or consignees, in the *British West Indies*, all such sum
 sums of money, debts, goods, chattels, and effects whatsoever
 were in any wise *due, owing, and belonging* to him from the
William Skirrow,

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It was then stated, that *Moore* and *Tyson* having received
 affidavit so certified and transmitted, and being so author
 by *Worwick* the defendant, did on the 6th of *March* 1782
 plead *Skirrow* in the king's court of the island of *St. Christopher*
 in a plea of trespass on the case, &c. for the recovery of the
 sum of 230 l. 17 s. 7 d. in which *Skirrow* was indebted
Worwick the defendant: that on the same day a writ of att
 ment grounded on the said plea according to the form of a cer
 law of the said island in that case made and provided, did at
 request of *Worwick* the defendant, duly issue out of the
 court of our said lord the king, by which said writ of attachm
 the provost marshal of our said lord the king, of the said isla
 or his lawful deputy, was commanded by our said lord the k
 to attach all and singular the goods and effects of the
Skirrow, in the said island, to answer to the said *Worwick* in
 plea aforesaid: that on the 7th of *March* 1782, the prov
 marshal did, according to the laws and customs of the said isla
 attach divers sums of money as the proper monies and effe
 of the said *William Skirrow* (the bankrupt) in the hands of
Thomas Worwick the younger, who then and there was a m
 chant and resident in the said island of *St. Christopher*, within
 jurisdiction of the said court: which said sums of money w
 the proper monies and effects of the said *William Skirrow* (the
 bankrupt) before and at the time when he became bankr
 as aforesaid, and were received before the time when he beca
 bankrupt as aforesaid, in the said island by the said *Thomas W*
wick the younger, by the order, and to the use of the said *Will*
Skirrow (the bankrupt) and then and there, to wit, &c.
 remain and were in the hands of the said *Thomas Worwick*
younger unaccounted for. It was afterwards stated that ju
 ment was recovered in the court of *St. Christopher's* :
 execution awarded, and that *Moore* and *Tyson*, as attornies

the defendant, received on the 14th of *May* 1783, the sum of 230*l.* 17*s.* 7*d.* from *Thomas Worfwick the younger*, the garnishee; that this money was remitted to and received by the defendant in *England* before the commencement of the present action, that he was requested by the plaintiffs to pay it over to them, which he refused, insisting upon his right to retain the same, &c. and that he had not proved his debt under the commission, nor in any other manner received satisfaction for the same, except as aforesaid, &c. &c. &c.

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This was first argued in *Easter* term 1789, by *Lawrence*, Serjt. for the plaintiffs, and *Le Blanc*, Serjt. for the defendant. The argument on behalf of the plaintiffs was as follows:

In this case there are two questions; 1. Whether the assignment of the bankrupt's effects to the plaintiffs did not pass all the right which he had to the money in the hands of the garnishee? 2. Whether, supposing the assignment to have had that effect, the plaintiffs are not intitled to recover, notwithstanding the proceedings in the *West Indies*? As to the first question, there can be no doubt, but that if this transaction had taken place in *England* the assignees would be intitled to the money attached by virtue of the *stat. 13 Eliz. c. 7. s. 2.*: the only doubt is, Whether they are so intitled, the attachment having been executed in the plantations. Now as the bankrupt himself might, before his bankruptcy, have assigned this money by deed or otherwise, in satisfaction of a debt, or to trustees for the benefit of creditors; the question is, Whether an assignment under the bankrupt laws does not operate as fully as such an assignment by the bankrupt himself? The court will, if possible, put this construction on the assignment by the commissioners, because the persons who are most likely to become the subjects of those laws, namely, traders of the most extensive dealings and connections, have, in general, great part of their property abroad, which justice requires should be divided among their creditors. The law expresses no distinction as to the property of a bankrupt being in one country rather than another. The words of the statute of *Eliz.* are "money, goods, chattels, wares, merchandizes, and debts *wheresoever they may be found or known*;" these are general words, and must be construed to extend to all places. They are not, in practice, confined in their operation. A ship at sea is often assigned under a commission of bankrupt, by virtue of those words. If any distinction can be attempted to be made, between the case of a ship at sea, and the present, it must

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must be on the ground, that the country in which the debt attached is governed by different laws. But it is not contended that the Great Seal has authority to extend its proceedings beyond the limits of this country, as to *all* the purposes to which it acts; it can neither compel an appearance before commissioners, nor has it any power to affect the person in another country; but the assignment of a bankrupt's property being a statutable conveyance for the benefit of creditors, must in reality be taken to convey all that property, without regard to local situation. The assent of every subject of the realm, is implied to proceedings which take place by virtue of an act of parliament. This doctrine is laid down 8 Rep. 137. *a.* and has been since recognized in the case of *Wadham v. Marlowe* (*a*). So in the present case, there was an implied assent to the assignment, both by the defendant and the bankrupt, neither of whom shall now be permitted to deny the effect of that assent.

It is said by Chief Baron Comyns, 1 Com. Dig. 519. that the commissioners of a bankrupt may sell his goods in *Ireland*; the commissioners may do this, so may the assignees; the property therefore vests in them. It was the opinion of Lord Tenterden (*b*) that the effects of a bankrupt in the plantations were liable to a commission here, and that the right was vested in the assignees. Whether the attachment in the *West Indies* will prevent the plaintiff from recovering must depend on this, namely: Whether the effects at the time of the attachment were the property of the bankrupt or not? If the property were his, passed to the assignees, and there could be no right to attach it but a debt owing to him was clearly his property. In the case of *Lewis v. Wallace*, Sir Thomas Jones, 223. it was holden that where a debtor had assigned to his creditor, a debt due to him from a third person, the assignor had nothing in it but as trustee for the assignee, and that it was not liable to an attachment by another creditor. So here the debt of the garnishee, after the assignment by the commissioners, was only in trust for the assignees. In *Le Chevalier v. Lynch* (*c*) Lord Mansfield said that it had been determined at the cockpit, upon solemn consideration, that bills by *English* assignees might be maintained in the plantations upon demands due to the bankrupt's estate which shews that he considered that the right to such debt was vested in them; and though he also said, that where, after

(a) *Cooke's Bank. Laws*, 518. *last edit.* and see a full note of this case, *ante*, 437.

(b) *Cooke's Bank. Laws*, *last edit.*, 522.

(c) *Dugl.* 167. *last edit.*

the bankruptcy, and beforepayment to the assignees, money owing to the bankrupt out of *England* was attached *bona fide* by regular process, according to the law of the place, the assignees cannot recover the debt, this doctrine only goes the length of shewing, that a debtor having been obliged by process, which he could not resist, to pay to the creditor attaching, should not be again compelled to pay to the assignees: but this only applies to the debtor who has paid the money, and not to the creditor who has received it. It is like the case of a recovery by an administrator, whose letters of administration are afterwards revoked, and another administrator appointed: in which case the debtor cannot be compelled to pay a second time, having paid to the former administrator, under legal authority which he could not resist. *Allen v. Dundas*, 3 Term Rep. B. R. 125. the second administrator must resort to his remedy against the former. 2 Bac. Abr. 11. In the case of (a) *Bradshaw and another assignees of Wilson v. Fairholme*, the court of session in *Scotland* decided that the attachment of Captain *Wilson's* debts in *Scotland* by creditors in *England*, could not be supported against the assignees. In (b) *Mackintosh v. Ogilvie* Lord *Hardwicke* granted a writ of *ne exeat regno* against one who had obtained arrestments of a bankrupt's property in *Scotland*, and said, that the court would prevent the creditor from having the effect of the arrestment, if the judgment was not before the bankruptcy; and the Solicitor General said that after such arrestments and foreign attachments the money had been recovered back in an action for money had and received.

In (c) *Solomon v. Rofs*, and *Follet v. Depentbiew*, the assignment of a bankrupt's effects to curators in *Holland* was admitted to have such an effect in this country, as to make void all proceedings in foreign attachment. So also in (d) *Neale v. Cottingham* the assignment by commissioners in *England* was allowed to have a similar effect in *Ireland*. *Pari ratione* therefore the assignment in the present case, by the commissioners in *England*, ought to extend to the property of the bankrupt in the *West Indies*.

Le Blanc, Serjt. *contrà*. The assignees in this case did not interfere to prevent the attachment. The defendant having obtained an advantage by using legal diligence, is intitled to

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(a) Decisions of the court of session from 1752 to 1756, p. 198.

(b) H.l. 21 Geo. 2. in *Canc*, sec 4 Term Rep. B. R. 193. *Hunter v. Potts*.(c) *Ante*, 133. n.(d) *Ante*, 133. n.

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tétain it. Though two questions were m
 plaintiffs, the only one to be considered in
 ferent statutes of bankrupts have with respo
 Now these statutes are merely local, bu
 operation to this country. The colonies
 be considered as foreign countries. It w
 assignment must have the effect of a conv
 himself: admitting this, the voluntary co
 rupt himself could not defeat the claims
 away what was obtained by legal proce
 the assignment of a *chose in action*, which
 session, is liable to the just demands of a
 statutes relating to bankrupts are confined
 they were passed, because they were origi
 a penal nature, confiscating the property
 penal laws are strictly local. The first c
 in any degree extended, was that of Capt
 the argument drawn from the words of tl
 "wheresoever found," it might with as
 that lands in a foreign country would pa
 the commissioners, lands being mentione
 as goods. The case of *Wadham v. Ma*
 form of the action, and the question, Wh
 to the assignment was not necessary to be f
 tain an action of debt, on the *reddendum*
 authority of *Com. Dig.* 519. it is merely a
 cited in support of it; and if it be allowe
 ably understood to mean, that the com
 effects in *Ireland*, subject to the claims of
 opinion of Lord *Talbot*, cited in *Cooke's Ban*
 is, What right vested in the assignees, wh
 them with all the privileges of the statu
England they have a power over the whol
 rupt, but in other countries the general i
 the statute must be restrained by the laws
 countries: still the question remains the
 right vests in the assignees? That right is
 the bankrupt himself had; but any assign
 been subject to his creditors' demands.
v. Wallace, cited from Sir *Thomas Jones*, if
stepher's were a trustee for the assignees he

(a) An account of this case is given in the judgment of t

made that defence to the attachment; or they might have appealed to the privy council. The case of *Le Chevalier v. Lynch* proves only, that the assignees should not be turned round by the debtor's saying, that he was only liable to the bankrupt himself; and that creditors in another country should not come in under the commission, unless they would renounce the priority they had gained; but this shews that they could not be compelled to give up that priority.

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In that case Lord *Mansfield* approves of the extent of the doctrine laid down by Lord *Hardwick*, and concludes with saying, that where money owing to the bankrupt out of *England*, is attached *bonâ fide* by the law of the place, the assignees cannot recover the debt; that is, they cannot recover it all. As to the argument drawn from the case of an administration being revoked, admitted the principle, that a debtor having once paid his debt to a person having legal authority to receive it, shall not be liable again to pay it, yet this principle is not applicable to the present case, unless it can be shewn that the assignment of a bankrupt's effects has, with respect to foreign countries, such a relation back, as to give the assignees a preference to creditors in those countries. As to those creditors, the assignment is considered as voluntary, and like other voluntary assignments, subject to their claims. The assignees in such case stand in the place of the bankrupt himself, but cannot recover a *chose in action* till it is reduced into possession. As to (a) *Wilson's* case, the principal question there was, Whether drawing and re-drawing bills was a trading within the bankrupt laws? the point now in dispute was not agitated. In the case of *Mackintosh v. Ogilvie*, there was no ground to restrain the defendant from going out of the kingdom, neither does it appear from the statement of it, either that he had gained an undue priority, or that he had no right to retain an advantage which he had legally acquired. In *Solomons v. Ross* the money was actually in the hands of the debtor, and when all parties were before the chancellor, he might use his discretion in compelling it to be paid for the general benefit of all the creditors. In *Follet v. Depontbieu* the curators filed their bill pending the attachment, having used diligence to prevent it. But in the present case, the assignees took no steps to prevent the attachment, to do which they had sufficient time. In *Neale v. Cottingham* also, the proceedings were depending before a court of equity, and all parties present.

(a) 1 Atk. 123.

Here

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Here the proceedings were at an end, the judgment executed, and the money paid over. Those were likewise cases in equity, but the present action is in a court of law.

That assignments by commissioners of bankrupts are considered as voluntary with respect to the colonies or foreign countries, and as such take place only between the assignees and the bankrupt, but do not affect the rights of other creditors, (who having gained a lawful priority are intitled to keep it,) appears from the case of *Cleve v. Mills* (a), *Richards and Others v. Hudson and Others* (b), and *Waring v. Knight* (c), in all which cases Lord Mansfield's doctrine is uniform as to this point, and perfectly agrees with *Le Chevalier v. Lynch*, and with the opinion of Lord Hardwicke recognized in that case. Conformable to this is the right which a confignor of goods has to stop them *in transitu* on the event of the insolvency of the consignee, and to retain them against the other creditors. So here, the defendant has by due diligence stopped the debt in question in *St. Christopher's*, and shall not be compelled to refund to the assignees, who took no previous steps to prevent the attachment.

Lawrence replied, that though the plantations were to be considered in this respect as foreign countries, yet this was not the assignment of a *chose in action*. It was an assignment of *goods* and *effects* in the hands of the garnishee; by that name they were attached, as appears on the face of the special verdict. Now it is not necessary to have possession in order to transfer the property of a personal chattel, though the want of possession is sometimes evidence of fraud. Neither is money in all cases a *chose in action*; here it was considered as specific effects, and so denominated in the attachment. To the argument, that if the words of the statute 13 *Eliz.* had a general effect, lands in foreign countries would pass by the assignment as well as goods, it may be answered; that in all countries, certain forms are to be observed in passing lands, without which a conveyance of them is not valid: but no such forms being necessary in transferring personal property, that may be conveyed by a mere contract; and an assignment by commissioners of bankrupt is as good a contract as any other. The authority before cited from 1 *Com. Dig.* 519. is not restrained by any words, to shew that the property of a bankrupt in *Ireland*, which is vested in the

(a) *Cooke's Bank. Laws*, 370. *last edit.*

(b) At the *Cockpit*, 1762, cited in argument, 4 *Term Rep. B.R.* 187. *Hunter v. Petts*.

(c) *Cooke's Bank. Laws*, 372. *last edit.*

assignees,

assignees, is subject to the claims of creditors in that country. The material point of Lord *Hardwicke's* decision, mentioned by Lord *Mansfield* in *Le Chevalier v. Lynch*, was, that "he would make no order till the *Scotch* creditors had abandoned their priority." The principle upon which Lord *Mansfield* there holds that the debtor shall be answerable to the assignees must be, that the property vests in them. The observations made on the part of the defendant on that case, are only applicable to the point there before the court, that of a debtor of the bankrupt being sued; but in the present case, the action is brought against a creditor. In *Solomons v. Ross* the attachment was completed, and execution would have followed if security had not been given, which was equal to actual payment; but there Mr. Justice *Bathurst* compelled the party to give up his security; the only ground of which compulsion must have been, that the property was vested in the curators; otherwise the decree would have been contrary to justice. Though in the next case of *Jollet and Another v. Deponthieu and Another*, the bill was filed pending the attachment, yet the question was, In whom the property was vested at the commencement of the attachment? and it was decided in favour of the curators or assignees. The same principle is also admitted in the case of *Neale v. Cottingham*, by the Chancellor of Ireland. As to the case of *Waring v. Knight*, Lord *Mansfield* decided there, on a ground not now tenable, that the form of the action was improper: but in *Kitchen v. Campbell*, 3 *Wils.* 304. it is decided, that either an action of *trover*, or for money had and received would lie, by the assignees, under the circumstances of those cases. Although the attachment in the present case was obtained by the sentence of a court of justice, yet where the truth of the case on which that sentence was founded, was not known, the money ought in justice to be recovered back, notwithstanding such sentence.

The authority cited from *Richards v. Hudson* at the *Cockpit*, was only an *obiter* opinion of Lord *Mansfield*, and not necessary to decide the point there in question. In the case of *Cleve v. Mills*, the doctrine of Lord *Mansfield* on this head likewise was *obiter*, and goes no farther than that of *Le Chevalier v. Lynch*, namely, to shew that the debtor of a bankrupt having paid his debt by virtue of process which he could not resist, should not be himself obliged to pay it a second time. But independent of authorities, the court will not hold out so great a temptation

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to fraud, as to prevent the effect of the assignment extending to the colonies; since if the law were so understood, some creditors would be continually gaining an undue preference to others, by the goods of a trader being sent out of the kingdom on the eve of his bankruptcy, and the equal spirit of the bankrupt laws would consequently be defeated.

After these arguments, it was agreed, that the case should wait the determination of a similar one (a) then depending in the court of King's Bench, which, it was understood, was to be argued before the twelve judges in the Exchequer Chamber.

But no such argument having taken place, the case was argued a second time in this court, in the present term, by *Adair*, Serjt. for the plaintiffs, and *Hill*, Serjt. for the defendant.

On the part of the plaintiffs, *Adair* rested on the authority of *Hunter v. Potts*, which he said was decisive of the present case, unless some material ground of distinction between the two cases could be shewn.

On behalf of the defendant, *Hill*, Serjt. argued in the following manner;—He submitted to the court two propositions:

I. That the debt received by the defendant, for the recovery of which this action was brought, did not vest in the plaintiffs by the assignment of the commissioners; and therefore, as they had no claim but under that assignment, they never had a right to the debt, nor consequently to the money received for it.

II. Supposing they ever had a right, they had lost it by their own fraud or laches.

1. That debts due to bankrupts in the island of *St. Christopher*, do not vest in assignees under a commission of bankrupt, will be proved, 1st, From the rules established for determining the extent and operation of statutes in general in the plantations, 2d, From the wording of the statute of bankrupts. 3d, From determinations both in law and in equity. After which, answers will be offered to the arguments used, and the authorities cited on the side of the plaintiffs.

1. As to the rules for determining the extent and operation of statutes in general over the plantations, there appears in 2 *P. Wms.* 75. and *Salk.* 411. to be an established distinction between plantations in new uninhabited countries, and plantations in conquered countries; that with respect to the former, it is necessary that in them the laws of *England* should prevail

(a) *Hunter and Others v. Potts*, 4 *Term Rep. B. R.* 182.

otherwise they would be without laws; but with respect to the latter, there is no such necessity, and therefore in them, the old laws of the conquered countries are in force, till new laws are given by the conquerors (*a*). Now the island of *St. Christopher* was jointly conquered, and possessed by the *English* and *French*, till ceded by the treaty of *Utrecht* entirely to the *English*: but there is no difference between a country conquered, and a country ceded by treaty; the distinction therefore above noticed is applicable to that island; and the consequence is, that in general statutes passed in this country, have there no validity or force. This rule with respect to plantations in conquered countries, has never been controverted, since the time when the determinations above alluded to took place; and even with respect to plantations in uninhabited countries, it has been construed not to extend to statutes of particular police; (*b*) of which kind are the bankrupt laws. This receives farther confirmation from,

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2. The wording of the statutes of bankrupts. The first now in use is 13 *Eliz. c. 7.* by which a power is given to the commissioners to assign debts "*wheresoever they may be found or known.*" But when that act was passed, the *English* had no plantations, and in the subsequent statutes (*c*) of *James I.* at a time when they had several, those words are admitted. Yet it must then have been obvious to the legislature, that those plantations had powers of making laws for themselves, and that statutes passed in this country would not be in force in those plantations, unless they were particularly mentioned, or comprised under general words necessarily including them. When indeed the legislature has designed to include the plantations, it has expressly mentioned them, as in *stat. 25 Geo. 2. c. 6. f. 10.* But though the bankrupt statutes are numerous, no mention is made of the plantations in any of them. On the contrary, some are so pointed, as to shew that the legislature had no notion of their extending out of the kingdom. This appears by the provisions relating to foreign attachments, all of which are confined to attachments in *England*. Thus the *stat. 1 Jac. 1. c. 15. f. 13.* provides, that debts due to bankrupts shall not, after the same are assigned by the commissioners, be attached as the debts of the bankrupt by any other person, according to the custom of the city of *London or otherwise*: which words or

(*a*) 7 Co. 17. b. 4 Burr. 2500. Cowp. 209.(*b*) 4 Burr. 2500.(*c*) 1 Jac. 1. c. 15. 21 Jac. 1. c. 19.

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3. As the statutes of bankrupts were never established in any of the king's foreign dominions by any legislative act, and as they could not, by the settled rules of construction, be extended to foreign countries, it was long doubted whether any or what notice could be taken of them in such countries. But it was at length settled, that the assignment of the commissioners operated as a voluntary assignment, binding as between the assignees and the bankrupt, but not affecting the rights of other creditors, and therefore not preventing their proceeding to attach debts due in those countries to the bankrupt. This Lord *Mansfield* held at the *Cockpit* (b), at the sittings at *Guildhall* (c), and in the Court of King's Bench, with the concurrence of the other judges of that court (d). This was also the opinion of Lord Chancellor *Hardwicke*, and of Lords Commissioners *Smythe* and

(a) 4 *Term Rep. B. R.* 184.

(b) *Cleve v. Mills*, *Cooke's Bankrupt Laws*, 670. *last edit.*

(c) *Waring v. Knight*, *ibid.* 372.

(d) *Le Chevalier v. Lynch*, *Dougl.* 169. *last edit.*

Bathurst (a) : but the precise time when this was first settled, does not distinctly appear. It is however to be found in a case (b) arising on the lunacy of Mr. *Morrison*, cited incorrectly by the counsel for the plaintiffs, in *Hunter v. Potts*, as the case of Mr. *Morris* (c), and not there stated as to the principal point, which is most material in the present case. Mr. *Morrison* being a bond creditor of the respondent, was under a commission of lunacy here, and the respondent removing into *Scotland*, his committees instituted a suit there; but the court in *Scotland* held, that the committees could not maintain their suit in that country. The reason against that decision, given in the appellant's printed case (d) was, that "*mobilia sequuntur personam*, and as Mr. *Morrison* was in *England*, the administration of his personal estate, granted by the usual authority where he resided, must be taken every where to be of equal force with a voluntary assignment by himself, and that assignments made under commissions of bankrupt in *England*, had been holden in *Scotland* of sufficient authority to commence a suit, and receive money there due to the bankrupt." The utmost insisted upon as the right of assignees of bankrupts, was, agreeable to Lord *Mansfield*'s opinion, a right to sue for and recover in *Scotland* debts there due. But as that was the whole, the case by no means proves that the debt could not have been attached, if a creditor of the lunatic, or of a bankrupt, (to a proceeding by whom the case was compared,) had proceeded by foreign attachment. In the (e) section of Lord *Kaims*' *Principles of Equity*, referred to in the argument for the plaintiffs in *Hunter v. Potts*, it is laid down as settled, "that an assignment in the *English* form of a debt in *Scotland*, does not transfer the *jus crediti*, and though first in time, will not avail against a more formal assignment *bonâ fide*," and afterwards the same author says; "We may safely conclude, the statutory transference of property from the bankrupt to the commissioners cannot carry effects in *Scotland*;" but adds, the *English* bankrupt statutes, however, must not be totally disregarded (f) by us." He afterwards allows the same operation to the assignment of the commissioners, as is mentioned by Lord *Mansfield*, "that in the forms of the law of *Scotland*, there appears nothing to bar the assignees from bringing a direct action

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(a) *Infra*, *Mawdesley v. Parke*.(b) *Dom. Proc. Feb. 1749*.(c) 4 *Term Rep. B. R.* 185.(d) *Page 1*.(e) *B. 3. c. 8. sect. 4. p. 360. 2d edit.*(f) *Sect. 8. p. 368.*

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“ against debtors of the bankrupt ; as
 “ might have done before his bankruptcy.
 ciple Lord *Hardwicke* decided in *Wilson’s*
 by Lord *Mansfield* (a), was thus, “ *W*
 “ had effects in *Scotland*, and some of
 “ ceded against the effects there, (the
 “ *Scotland* analogous to the foreign attach
 “ which an application was made to the
 “ their proceedings (the parties who se
 “ foot living in *England*). But Lord *H*
 “ not be done, for our bankrupt laws v
 “ and therefore the parties had a right to
 “ that if the effects there were not suffice
 “ debt, and he applied for a dividend
 “ here, in that case he would postpone
 “ ditors were paid in the same proportio
 This is the same rule that is always ob
 legal and equitable assets : the court can
 right of creditors by specialty to be paid,
 contract creditors, out of legal assets ; bu
 table assets, every specialty creditor wh
 debt out of legal assets, is postponed, till
 creditors are paid out of the equitable a
 specialty creditor has received out of the le
 case Lord *Hardwicke* did the like, with re
 creditors who lived in *England*, and attache
 in *Scotland*. That case therefore is a dete
 the right insisted on by the defendant in
 if the creditors in that case had not a right
 by the means they used for that purpose,
 those used by the present defendants,) in
 country, Lord *Hardwicke* might, and ou
 their gaining any advantage by the forei
 opinion of Lord *Hardwicke* and Lord *Ma*
 principle long ago established, that the a
 are in the same, and no better situation tha
 and therefore take subject to every equity
 ject. This appears (b) from the case of *T*
 564. where the mortgagee of a copyhol

(a) *Cooke’s Bankrupt Laws*, 373. last editi

(b) 1 *Atk.* 188. *Browne v. Jones and Oth*

mortgage surrender presented at the next court, by which, by the custom of the manor, it became void at law; but the Lord Keeper decreed the assignees under a commission of bankrupt against the mortgagor, to pay principal, interest, and costs, or be foreclosed. That case shews that the assignment of commissioners of bankrupt, even in *England*, has only the operation of a voluntary assignment; for in that case, if a purchaser for valuable consideration, without notice, had acquired the estate, he would have excluded the mortgagee. The right of the creditor to take advantage of the law of foreign attachment against the assignees, is a consequence of the assignment to them not operating as a transfer for a valuable consideration, but as a voluntary assignment. A voluntary assignment of a debt in *England* would not prevent its being attached by the custom of *London*, and therefore, as the assignment of commissioners of bankrupt operates in foreign countries as a voluntary assignment, it cannot prevent debts in those countries being attached by the creditors of the bankrupt; particularly, as the assignment of the commissioners even here operates as a voluntary assignment, except in cases where an express provision is made to give it a more forcible operation, such as there is with respect to foreign attachment, here, by custom and as there is also by *stat. 1 Jac. 1. c. 15. s. 5.* with respect to the disposition by the commissioners of the bankrupt's real and personal estates, notwithstanding any prior voluntary settlement; which provisions would have been unnecessary, if the assignment were, of itself, more forcible than a voluntary assignment. That part of the argument for the assignees in (*a*) *Hunter v. Potts*, which tends to prove that they take as representatives, is a confirmation of their taking as volunteers, except in cases where they are enabled by statute to take in a stronger manner. When indeed the statutes of *Elizabeth* and *James* were passed, on which alone the present case depends, (as was admitted by the counsel for the assignees in (*b*) *Hunter v. Potts*.) the law was taken to be, that debts due to the representatives of debtors were liable to be attached for the debts of the original debtors. In the case of intestacy, the only doubt as to administrators taking subject to foreign attachment, was owing to there being no such office as that of administrator at common law; for which reason it was doubted (*c*), whether a custom could be applicable to them. But notwithstanding that doubt, it was

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holden that debts due to administrators were liable to be attached by the creditors of the intestate, in those places where there was a custom of foreign attachment (a).

In the case of *Cleve v. Mills*, Lord Mansfield held, "that the statutes of bankrupts do not extend to the colonies, or any of the king's dominions out of *England*, but the assignments under such commissions are considered as voluntary, and as such take place between the assignees and the bankrupt, but do not affect the rights of any other creditors." In *Waring v. Knight*, "Sims the bankrupt went to *Gibraltar*, and the defendant sent a power of attorney there to commence a suit against the bankrupt, which was done, and a decree obtained, and his goods taken in execution and sold, and the debt paid to the defendant; to recover which, the action was brought." Lord Mansfield held, "that this money being recovered by sentence in a foreign court, could never be recovered back by the assignees, *our bankrupt laws not extending to any of our foreign settlements*. He also said, it had been for a long while doubted, whether the assignees could recover a debt due in a foreign country to the bankrupt; but of late it had been determined they might; (in a case at the *Cockpit*;) so a debt may be recovered here due to a bankrupt in a foreign country, *where the law obtains analagous to our bankrupt laws*, which other countries will take notice of, and consider it in the same light as if the bankrupt had made an *actual assignment*;" by an *actual assignment*, his Lordship must have meant a *voluntary assignment*, agreeable to his opinion expressed in other cases. The case of *Le Chevalier v. Lynch* was a determination against the assignees, and in point with the present, and that, after the same right had been insisted on for the plaintiff as is now contended for, except that the action was against the garnishee. But that circumstance was not (nor could be as shall hereafter be shewn) the ground of the determination, notwithstanding what was said in the argument for the plaintiffs in *Hunter v. Potts* (b).

The case of *Mawdesley v. Parke and Beckwith* (c), was this, "The defendants were assignees under a commission of bankrupt against *Campbell and Hayes*, and after the assignment to them from the commissioners, several of the bankrupt's creditors

(a) *Ibid.* and 1 *Roll. Abr.* 554. (K) pl. 2.

(b) 4 *Term Rep. B. R.* 187.

(c) *Lincoln's Inn Hall*, Dec. 13th 1779, before the Lords Commissioners Smythe and Bathurst.

“ in *Rhode Island* attached a debt due from the plaintiff to the
 “ bankrupt, in pursuance of an act of assembly there, autho-
 “ rising such process. The plaintiff coming to *England*, the
 “ assignees brought an action at law against him, and the bill was
 “ filed for an injunction, the plaintiff offering to pay what, if
 “ any thing, should appear to be due to the assignees, after de-
 “ ducting what should be recovered against him by the plaintiffs
 “ in the foreign attachment. The assignees by their answer in-
 “ sisted, that the property of the bankrupts was vested in them
 “ before the writs were served on the plaintiff, and therefore that
 “ he had no money or effects belonging to the bankrupts in his
 “ hands, and consequently that the plaintiffs in those writs were
 “ not intitled to recover any thing. An injunction had been
 “ granted, and on shewing cause why it should not be dissolved,
 “ the Lords Commissioners *Smythe* and *Bathurst* continued the
 “ injunction to the hearing, and refused to order the plaintiff to
 “ bring the money into court, but directed that he should give
 “ security to be approved of by the master, to pay the defendants
 “ what (if any thing) should be decreed to be due: and they were
 “ of opinion, that the assignment did not divest the property out
 “ of the bankrupts, as the debt was due in the plantations, but
 “ only gave the assignees a *right to sue for it*; that the creditors
 “ there had also a right to sue for it, who having commenced a
 “ suit first, and recovered judgment there, (on which there were
 “ appeals here depending, as was said at the bar, and was the
 “ fact, though it did not, nor could appear on the pleadings, being
 “ subsequent to them,) *had gained a priority* over the defendants;
 “ though it was admitted, that there had been two cases (*a*), one
 “ determined by Mr. Justice *Bathurst* sitting for Lord *Northington*,
 “ the (*b*) other by Lord *Camden*, where commissions of bankrupts
 “ were issued in *Holland*, and some of the bankrupts’ effects at-
 “ tached in *London*, and the attachments were ordered to be
 “ discharged, and the money or effects paid to the assignees; and
 “ though it was argued by the counsel for the defendants, that
 “ the rule in that respect ought to be reciprocal, yet it was an-
 “ swered, that the *bankrupt laws were not received in the plantations*,
 “ and therefore this case was not like those two which were men-
 “ tioned, there being bankrupt laws in *Holland*.”

The distinction in that case was well founded. For as *Scot-*
land, with respect to its laws, continues, notwithstanding the

(a) *Solomon v. Rose*, ante, 131, 2.

(b) *Follett and Another v. Deponthieu and Another*, 132, 2.

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union,

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But all questions arising on the laws of any particular country, in respect to their operation in foreign countries, especially such as relate to war or commerce, are to be determined by the law of nations, one maxim of which is equality (a). The bankrupt laws therefore of all foreign countries ought to be allowed their operation here, on a presumption, that our bankrupt laws would be allowed to have effect in those countries. But in the plantations there are no bankrupt laws which could operate here, our bankrupt laws therefore ought not to be extended to them. It was on this ground that they were at first disregarded in the plantations ; but, as appears from Mr. *Morrison's* case, commissions of lunacy and bankruptcy were afterwards considered as investing the commissioners or their assignees with a power of seizing and recovering the effects of the lunatic or bankrupt, though not as giving them any right before seizure or recovery. This having become the usage in the plantations, (which is one mode by which statutes may be in force there, as appears by 25 *Geo. 2. c. 6. s. 10.*) so far they are in force there, and so far they have been allowed to be by Lord *Hardwicke* and Lord *Mansfield*, and no farther.

Thus much being advanced in support of the first proposition stated in the outset of the argument, answers shall next be attempted to the reasoning used, and authorities cited on the other side of the question, particularly in the case of *Hunter v. Potts*.

It was said in arguing that case (b), that the case of *Le Chevalier v. Lynch* was not applicable, because the action was against the garnishee, and that nothing could be more clear, than that a person who had been compelled by a competent jurisdiction to pay the debt once, should not be compelled to pay it over again ; and it was farther said, " that *Cleve v. Mills*, and " *Allen v. Dundas*, went upon the same principle." But to this it may be answered, 1st, that not one of the cases above cited for the defendant were determined on that principle ; that in *Waring v. Knight* the action was against the plaintiff who recovered the money from the bankrupt, and in *Mawdesley v. Parke* the garnishee was the sole plaintiff, and the plaintiffs in the foreign attachment were not before the court ; yet both those cases were determined in the same manner as when the

(a) On this cap. 30. of *Magna Charta* is founded.

(b) 4 *Term Rep. B. R.* 187.

actions were against the garnishees : 2dly, The garnishee is the proper person against whom the action should be brought ; for he must be the correspondent of the bankrupt, and ought to give him and his assignees due notice. If he does give them notice, they ought to defend the suit, or else be bound by it. On the other hand, if he does not give due notice, he ought to pay the money over again (a), for the fault was in him in not giving it. He ought to suffer by his own laches, rather than the plaintiff in the foreign attachment, who has been thereby prevented from coming in under the commission. The other case of *Allen v. Dundas* was on quite a different subject. The point there decided was, that payment to one who had a probate as executor of a forged will, notwithstanding the probate was afterwards revoked, was a good discharge against a subsequent rightful administrator. The reason of which is, that the party was not in fault, and the law will protect parties who are not in fault. But it will not protect those who are in fault, as every garnishee must be, who does not give due notice to the principal, when time is allowed for that purpose. Here more than thirteen calendar months appear, by the special verdict, to have been allowed for that purpose.

As to the supposed change of opinion of Lord *Hardwicke* and Lord *Mansfield*, it was said (b), that Lord *Hardwicke* in the case of *Mackintosh v. Ogilvie* granted a writ of *ne exeat regno* against one who had obtained arrestments of a bankrupt's property in *Scotland*, and this was placed among the *decisions* said to be *expressly in point*. But in fact it was no decision at all concerning a foreign attachment, but a *Scotch* arrestment, which was indeed compared with a foreign attachment. What the circumstances of that case were, does not fully appear, but according to the note of it, the person who made the arrestments had got the money into his hands, which, it is presumed, is by the *Scotch* law inconsistent with every species of arrestment. There must therefore have been something unjust done by the defendant, which might be the reason for granting the *ne exeat regno*. However, as far as it concerns the present case, it was but an *obiter* and extra-judicial opinion. Lord *Mansfield*, when at the bar, is made to say (c), “ there had been many instances

(a) If money be attached and paid thereon, and afterwards the original creditor sues for the same, and the attachment happens to be ill pleaded, or otherwise avoided, the party must pay the money over again, and hath no remedy either in law or equity. *2 Show. 374. anon*

(b) 4 *Term Rep. B. R.* 138.

(c) *Ibid.*

“ where

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" where, after such arrestments and foreign attachments by
 " creditors, the money had been recovered back again by the
 " assignees under the commission, in actions for money had and
 " received." But as not one of those many instances appear,
 and as in three several instances his Lordship determined the
 contrary, it is more than probable that the note was mistaken.
 The case of (a) *Ballantine v. Golding* cited in the argument of
Hunter v. Potts, to prove Lord Mansfield's change of opinion,
 related not to the assignment, but to the certificate, and the for-
 mer is only in question in this case: a change of opinion there-
 fore with respect to the last, if there had been any, would be no
 proof of a change with respect to the first. But there was no
 change of opinion at all, for in that case the debt was con-
 tracted, and the certificate obtained in *Ireland*; and therefore the
 debt was legally discharged, and could not be revived by the
 bankrupt's coming afterwards into *England*. What was said by
 Lord Mansfield that " a discharge by the law of one country
 " will be a discharge in another," is to be understood with refer-
 ence to the case then before him: but, whatever it was he said,
 the case was not determined upon it, but put off to another day,
 when the point was given up on the authority of (b) *Burrows*
v. Jemine. Now the point determined in *Burrows v. Jemine*
 was, that the sentence of a foreign court of a competent jurisdic-
 tion is decisive: so that the principle, if applicable at all to the
 present case, is rather against than for the plaintiffs, as there was
 a sentence in *St. Christopher's* in favour of the defendant.

Another argument for the assignees was " that with respect to
 " personal property, the *Lex Domicilii*, and not the *Lex rei sitæ*
 " is permitted to prevail;" to prove which, many cases were
 mentioned, and others referred to, as collected in *Bruce v.*
Bruce (c). But in that case, the principle contended for was
 controverted, and the appellant who rested his case upon it,
 failed. If he failed on the fact, there could be no determination
 on the principle, if on the law, the determination was contrary
 to the principle. The case therefore either proves nothing on
 either side, or else it makes against the plaintiffs in the present
 action. And though many of the cases there cited, prove that
 the succession to an intestate's personal estate is to be determined
 by the law of the place where he had his *domicile*, yet in none of
 them is there so much as a *dictum*, that debts due to him may

(a) *Cooke's Bank. Laws*, 1st edit. 522.(b) 2 *Sira.* 733.(c) *Dom. Proc. Ap.* 1790.

not be attached by the law of the country where due. But admitting the rule, that the *Lex Domicilii* is to prevail, yet it is begging the question to draw any inference from that rule to the present case. For that would be going on a supposition, that by the law of this country, the property of debts due to bankrupts in *St. Christopher's* vests in the assignees under a commission of bankrupt here, which is the very point in question. If it does not vest, then the law of the country, which is the domicile of the bankrupt, and the law of the country where the debt is due, are the same, and by the law of both countries the plaintiffs have no property in the money for which they have brought this action, but had only a right to sue for it in *St. Christopher's*: which as they have not done, but acquiesced till it was recovered by the defendant, he is intitled to it. Two authorities, *Cro. Eliz.* 683. and *Skinn.* 370. were cited, that an alien enemy may maintain an action here as administrator. But that affords no argument against the defendant; rather the contrary; for an administrator sues *en autre droit*, and if the intestate were an alien enemy, the administrator could not maintain any action; which is implied, *Skinn.* 370. The cases of *Pipon v. Pipon* and *Bruce v. Bruce*, relate only to questions of the succession to the effects of intestates; and as that of (a) *Kilpatrick v. Kilpatrick* is among them, and not particularly stated, it is to be presumed to be of the same kind. In *Precedents in Chanc.* 207. and 1 *Bro. Parl. Cas.* 38. the question was on the construction of marriage articles made in *France*, which was decided in this country, to which the parties had fled. The decision seems to have been, that the construction must be made according to the law of *France*. But whether it was or not, that is now settled to be the rule of construction in like cases, and if applicable at all to the present case, is against the plaintiffs, as the debt was contracted at *St. Christopher's*. With respect to (b) *Richards v. Hudson*, and (c) *Beckford v. Turner*, the first relates only to rights not clearly stated, nor as far as appears, applicable to this case; the other is against assignees, and mentioned only to be answered. Three cases (in the notes, *ante*, 131, 132, 133.) were holden to have removed all doubts. But the two first, as far as appears, passed without argument, and in *Mawdesley v. Parke* were distinguished from that case, (as has been already observed,) inasmuch as there are no bankrupt laws in the plantations, whereas

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(a) 4 Term Rep. B. R. 185.

(b) *Ibid.* 187.(c) *Ibid.* 188.

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in *Holland* there are ; for which reason they are also equally distinguishable from the present case. With respect to the first of them, *Solomons v. Rofs*, as Lord Commissioner *Bathurst* could not but know of his then late determination, he must have been the best judge of it, and if it was not applicable to the case then before him, (*i. e. Mawdesley v. Parke*,) it certainly cannot be to the present, as both cases arose in the plantations, that of *Mawdesley v. Parke* at *Rhode Island*, in which there was a law for foreign attachments stated and admitted in the pleadings ; but no such law was stated in *Hunter v. Potts*, and therefore the court could not suppose that there was any. That is likewise a material distinction between the present case and *Hunter v. Potts*, especially as it seems admitted by the (a) court, that if there had been such a law in that country the determination would have been different. As to the case before Lord *Camden* of *Jollet v. Deponthieu*, he took no note of it (b), and as he did not, and no argument appears in the printed note, it is reasonable to suppose there was none, and consequently that the point passed unnoticed in that case, as well as the other. With regard also to the case of *Neale v. Cottingham*, before the Chancellor of *Ireland*, no arguments are there stated ; and besides, as the bankrupt laws were then introduced in *Ireland*, that case is likewise within the distinction taken in *Mawdesley v. Parke*. Notes of cases without the grounds on which they were determined, ought to have but little weight, in opposition to cases decided on argument, and supported by general rules and principles, which are more to be relied on than particular opinions ; especially when those opinions are not (c) reconcilable, as they were admitted not to have been, by the counsel for the plaintiffs in *Hunter v. Potts*, previous to that case. But there was no inconsistency in the decisions on this point. For though it was said in that case, that (d) “there were several decisions “ expressly in point,” yet it is submitted, that there is *not one to be found*, till that case was decided, *in which the point determined was, “ that a creditor of a bankrupt cannot, after an assignment by “ the commissioners, recover by foreign attachment in the plantations “ his debt, from a debtor of the bankrupt there,”* which is the point in the present case.

Another argument for the plaintiffs was, that as all the parties were inhabitants of *England*, they were bound by the bankrupt laws, the evasion of which it was a fraud to attempt.

(a) 4 Term Rep. B. R. 192. (b) *Ibid.* (c) *Ibid.* 186. (d) *Ibid.*

But

But this argument takes that for granted, which is to be proved, namely, that the bankrupt laws vest the property of debts in *St. Christopher's* in assignees of bankrupts; which is the point on which the case depends; for if the property of the debt in question did not vest in the plaintiffs by the assignment, the defendant had a right to attach it. Though he is bound by the laws of this country, yet unless those laws do in this respect extend to *St. Christopher's*, (which is the point in dispute,) he has not acted contrary to them in taking a legal course to secure his debt, which the jury have found to be a just debt. Every fair creditor has a right to make use of any legal means to secure his debt, and the using those means cannot be a fraud. Besides, there were similar circumstances in the case of *Waring v. Knight*. If indeed this argument were allowed, it would put the *English* in a worse situation than other nations, which would be both unjust and impolitic. The fraud is not in the defendant but in the plaintiffs; which brings the argument to the second proposition submitted to the court, *viz.*

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II. That supposing the plaintiffs ever had a right to recover the money which they demanded, they have lost it by their own fraud or laches.

Their claim is founded on the assignment of the commissioners, which was on the 5th of *March* 1782. The present action was not brought till *Trinity* term 1787. It is impossible that they should not, from the bankrupt's examination, and the inspection of his books, have known of this debt due to him in *St. Christopher's*; and if they also knew of the proceedings there, then their acquiescence from the 5th of *March* 1782, to the time when judgment was obtained in *St. Christopher's*, was a fraud. But if they did not know of the proceedings, (which is incredible,) it was gross negligence (*a*) not to make an enquiry, of which they ought not to be permitted to take advantage. They acquiesced above five years before they brought the present action, and nine have elapsed before it is determined. And as far as appears, no application was made to the defendant till just before the action was brought. Many of the creditors under the commission must be dead, or not to be found; and those who are living have probably given up all thoughts of any future dividend, by which means, the plaintiffs will, of course, keep to their own use, all, or the greatest part, of what, if any thing, shall be recovered of the defendant, who has lost the

(*a*) 2 *Will.* 354.

1791. opportunity of obtaining any satisfaction for his debt, and has been put to great expence; all which would have been prevented, if the plaintiffs had defended the action in *St. Christopher's*. For then, either judgment would have been given for them at a far less expence than what has been incurred, and the defendant would have had an opportunity of proving his debt under the commission, and receiving his dividend; or, if the judgment had been given against them, they might have appealed to the King in Council, which would have been the proper way of proceeding (a), and would have been speedily determined. But they suffered judgment to go against the bankrupt and the garnishee, by a competent jurisdiction, which not being appealed from, ought to be decisive. It is not to be considered as *res inter alios acta*, since there is that privity between the plaintiffs and the garnishee, that the judgment against the garnishee, was, in effect, a judgment against the assignees, especially as it was not possible to make them parties. Though they are assignees under a commission of bankrupt, yet their acts and defaults are binding on the other creditors under the commission, by whom they are chosen, to whom they are accountable, and who have a right to inspect their books and proceedings. This appears from the case of *Troughton v. Gitley*, *Ambl.* 630. where one of the assignees encouraged an uncertificated bankrupt to set up again in his trade, which he did, and carried it on for four years successively, and then died; upon this the assignees filed a bill against his administrator for his personal estate, and though it is clear, that all effects acquired before a bankrupt obtains his certificate, belong to his creditors under the commission, in preference to any others, yet Lord *Camden* decreed in favour of the new creditors, and held that the case fell within the principle, that if a man having a lien stands by and permits another to make a new security, he shall be postponed, like the common case of a first mortgagee suffering a second mortgage, without giving notice of his security: his Lordship therefore thought that the creditors under the commission ought to lose their priority. The same principle is applicable to this case. If indeed the plaintiffs were to recover, it would encourage future assignees to delay the getting in debts till it was impossible to distribute them among all the creditors, and what was not distributable would be retained by themselves. On this last proposition therefore,

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(a) 2 *Lord Raym.* 1447.

as well as on the general question, it is submitted that the judgment of the court ought to be for the defendant.

Cur. vult advis.

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On this day Lord *Loughborough*, after stating the special verdict, proceeded in the following manner :

The question is, Whether the assignees of the bankrupt have a right to recover this money as money had and received to their use ? The objection made to it is, that the money was recovered by process in the *Island of St. Christopher*, in which the bankrupt laws of *England* have no direct binding force. A variety of cases have occurred on this question ; and there is some confusion in the reports of them, which made a very deliberate consideration of it necessary. Not that I think it appears from the mere terms of the case itself, that the decision of this particular case could be attended with any great difficulty, or that any great question could arise out of it. The whole which has been argued, has been as to the operation of the bankrupt laws in countries not subject to the jurisdiction of the courts of this country. In the present case, it is difficult for me to conceive that this question can arise out of the facts stated. For the simple state of the case is no more than this. The defendant resident in *England*, and a creditor of *Skirrow* in *England*, has received money which was due to *Skirrow* in the island of *St. Christopher* at the time of his bankruptcy, and which at that time was subject to no lien whatsoever. The money being remitted to *Worwick* in *England*, and being clearly money which at the time of the act of bankruptcy was the property of the bankrupt, and subject to no lien whatever, he is, *primâ facie* accountable for it to the assignees. The defence he makes is, that he recovered this money by legal process in the island ; but he states also that the process was founded on an act done by him in *England*, and under the aid of the law of *England*. For the foundation of the recovery was an affidavit of debt made before the mayor of *Lancaster*. Without that affidavit he could have instituted no proceeding in *St. Christopher's* ; the money would have remained subject to the demand of the assignees whenever they had been apprized that such a debt was due, and had sent out proper powers. These propositions cannot be doubted. Then it is not a question whether the bankrupt laws have an operation at *St. Christopher's*, but, Whether they operated at *Lancaster* ? It is a question, Whether a creditor resident in *England*, subject

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But the argument has gone into a more general consideration of the cases which have arisen under different circumstances, in which the bankrupt's property being dispersed abroad, or he himself having changed his residence, advantage has been taken of his local situation, or of the local situation of the property which has been attached. This leads me to a short consideration of the cases on this subject, in which I see no difference if their circumstances are rightly understood and rightly applied. First, it is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country. In the case of *Pipon v. Pipon* (a), a party had possessed himself of a debt which was due to the intestate a subject of *Jersey*, and whose personal property was therefore governed by the law of *Jersey*. Lord *Hardwicke* was applied to by his other relations resident in *England*, stating that they should be excluded from a share according to the distribution of *Jersey*, but that they should be intitled to a share according to the distribution of *England*; and they therefore prayed by their bill, that the administratrix might be restrained from taking the property to *Jersey*. Lord *Hardwicke* very wisely and justly determined that he would not restrain the administratrix, he would not direct in what manner she was to dispose of the property, or to distribute it. Having acquired the right to it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate (b).

(a) *Amb. 25.*

(b) [See the cases under the title, *Statute of Distributions*, in the *Parliament cases*, 3vo.]
Personal

Personal property then being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of *England*, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of *Solomons v. Ross* (a) and *Follet v. Deponthieu* (b), where the laws of *Holland*, having in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates, the court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts. In those cases the court of Chancery felt very strongly the principle which I have stated, and it has had a very universal observance among all nations. But it may happen, that in the distribution of the law in some countries, personal property may be made the subject of securities to a greater or less extent, and in various degrees of form. It is in those cases only that any difficulty has occurred. A question of this nature came before Lord *Hardwicke* very largely in the bankruptcy of Captain *Wilson*. With the little explanation I am enabled to give of that case, in which the court of session entirely concurred with Lord *Hardwicke*, the distinctions will be apparent. There were three different sets of creditors who claimed, subject to the determination of the court, on the ground that *Wilson* had considerable debts due to him in *Scotland*. By the law of *Scotland* debts are assignable, and an assignment of a debt notified to the debtor, which is technically called an *intimation*, makes a specific lien *quoad* that debt. An assignment of a debt not intimated to the debtor, gives a right to the assignee to demand that debt, but it is a right inferior to that of the creditor, who has obtained

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WICK.(a) *Ante*, 131.(b) *Ante*, 132.

1791. his assignment and intimated it. By the law of *Scotland* al-
 there is a process for the recovery of debts, which is called
 arrestment. Some of *Wilson's* creditors had assignments of specific
 debts intimated to the debtors and completed by that in-
 timation, prior to the act of bankruptcy. Others had assignmen-
 of debts not intimated before the bankruptcy. Others h-
 arrested the debts due to him subsequent to the bankruptcy, a-
 were proceeding under those arrestments to recover payment
 those debts. The determination of Lord *Hardwicke* and that
 the court of session entirely concurred. The first class I ha-
 mentioned, namely, the creditors who had specific assignmen-
 of specific debts, intimated to the debtors prior to the bankruptc-
 were holden by Lord *Hardwicke* to stand in the same situation :
 creditors claiming by mortgage antecedent to the bankruptcy.
 All therefore he would do with respect to them was, that
 they recovered under that decree, they could not come in unde-
 the commission without accounting to the other creditors for
 what they had taken under their specific security. With respect
 to the next class of creditors, Lord *Hardwicke* was of opinion
 and the court of session were of the same opinion, that their title
 being a title by assignment, was preferable to the title by arrest-
 ment; and they likewise held, that the arrestments being sub-
 sequent to the bankruptcy, were of no avail, the property being
 by assignment vested in the assignees under the commission. It
 is in this sense that an expression has been used by Lord *Mans-
 field*, in one or two cases, in which his language rather than
 his decision has been quoted, with respect to the law of *Scotland*,
 namely, that the effect of the assignment under a commission of
 bankrupt was the same as a *voluntary assignment*. For so the law
 of *Scotland* treats it, in contra-distinction to the assignment per-
 fected by intimation, and to an assignment which the party
 might be compelled to make. But it does not follow that it is
 an assignment without consideration. On the contrary, it is for
 a just consideration; not indeed for money actually paid, nor
 for a consideration immediately preceding the assignment. In
 that respect therefore it is a voluntary assignment. But taking
 it to be so, it excludes and is preferable to all others attaching.
 it is preferable to all the arresters, it is preferable to all creditors
 who stand under the same class, and to all who have not taken
 the steps to acquire a specific lien till after the act of bankruptcy
 committed. In a variety of cases, enumerated in (a) Lord

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(a) In *Hunter v. Pitts*, 4 Term Rep. B. R. 152.

Kenyon's opinion, the same idea has prevailed, which I think is founded on the clearest and most evident principles of justice. If the assignees in this case had sent a person over to *St. Christopher's* to act for them, if they had given notice of the assignment, the court of *St. Christopher's* ought unquestionably to have preferred the title of the assignees to the title of the creditor using the process of attachment, because the law of the country, to which the creditor making the demand was subject, had, on a just consideration, vested that property in the present plaintiffs. As I take the determination in the court of Chancery in the case of *Solomons v. Ross* and the other case, to be founded, not on any policy of technical notions of the law of *England*, but on general law, preferring the title of the assignees to the title of the arresting creditor, the court in *St. Christopher's* ought also to have preferred the title of the assignees. When I have laid this down, it by no means follows, that a commission of bankrupt is an operation in another country, against the law of that country. I do not wish to have it understood, that it follows as a consequence from the opinion I am now giving, (I rather think that the contrary would be the consequence of the reasoning I am now using,) that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided. But another case may possibly occur, of a suit brought against the bankrupt personally, and a case of this sort was stated in the argument, *Waring and Others v. Knight*. I have not been able to get a particular account of that case. It is shortly stated in *Cooke's Bank. Law*, 372. that a person having committed an act of bankruptcy had gone over to *Gibraltar*, that a commission of bankrupt was taken out against him, and that the defendant brought an action against him in *Gibraltar*, and obtained judgment, and under the judgment payment of his debt. Whether the person was resident at *Gibraltar* prior to the bankruptcy, whether the debt was contracted at *Gibraltar*, whether he appeared to the commission in *England*, none of these circumstances are stated. But the de-

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cision would undoubtedly be very materially varied by those circumstances. Lord *Mansfield* held, that the defendant having recovered the debt against the bankrupt who was personally present at *Gibraltar*, was not answerable to the assignees for the money. I am told in one account of that case, that it turned on the form of the action. But this is clear, that there being no certificate, the defendant in that case had a right to sue the bankrupt. A bankrupt in this country without a certificate may be sued; and though his goods could not be taken in execution, being vested in the assignees, yet his person might. There was, therefore, a good commencement of the suit against the person of the bankrupt at *Gibraltar*. How the debt was contracted, and how the suit was carried on, the report gives no account. However, it is at most but a decision at *Nisi Prius*, and is the only case which seems at all to stand against the current of authorities, which hold that the operation of the bankrupt laws, with respect to the personal property of the bankrupt, when that property is brought into this country by any one who has obtained it, is to carry a right to recover it to the assignees for the benefit of all the creditors. But, as I said before, it is not necessary to go the whole length of that discussion, because on the circumstances of this particular case, the question is merely, Whether a creditor of the bankrupt resident in *England*, and knowing of the bankruptcy, shall avail himself of a process which he has commenced in *England*, so as to retain his debt from the assignees, and gain a preference over the other creditors? This is a proposition too clear to require any discussion. The consequence therefore is, that there must be

Judgment for the plaintiffs (a).

(a) [See *Phillips & al. v. Hunter & al.* | ciple of this case was affirmed in the Ex-
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